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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 232

BRONX BRASS FOUNDRY, INC., PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF J. R. PALMENBERG'S SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 9, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of J. R. PALMENBERG, INC., Bankrupt,

BRONX BRASS FOUNDRY, INC., Claimant-Appellant,

IRVING TRUST COMPANY, as Trustee, Appellee

STATEMENT UNDER RULE

This proceeding was begun by the filing of a petition to expunge the claim of Bronx Brass Foundry, Inc. on Jan. 9, 1934. An answer was interposed by the claimant to the objections on or about the 16th day of February, 1934.

There has been no change of parties or attorneys.

The objections came on for hearing before Hon. John E. Joyce, Referee in Bankruptcy. On June 29, 1934, an order was entered by said Referee expunging the claim of the Bronx Brass Foundry, Inc. A petition for review was filed on the 11th day of July, 1934. On the 11th day of September, 1934, Hon. Alfred C. Cox, one of the Judges of the U. S. District Court for the Southern District of [fol. 2] New York, entered an order dismissing the petition for review and approving the order of the Referee. On October 5, 1934, a notice of appeal and assignment of errors was filed by the claimant, Bronx Brass Foundry, Inc. On October 5, 1934, another notice of appeal and assignment of errors was filed by the claimant, Bronx Brass Foundry, Inc., and an application made thereon to the Circuit Court of Appeals for the Second Circuit for leave to appeal from the said order of the District Court. On October 15, 1934, the United States Circuit Court of Appeals for the Second Circuit granted the application made by the claimant for leave to appeal from said order of the District Court.

In United States District Court, Southern District of New York

In the Matter of J. R. Palmenberg Sons, Inc., Bankrupt

Proof of Debt and Power of Attorney

United States of America,
Southern District of New York, ss:

At the above District, in the County of New York, State of New York, at the date hereinafter set forth came Harry [fol. 3] Friedman residing in the Borough of Bronx, City of New York, and says:

I

A. That he hereinafter designates himself as claimant.

(or as appears below.)

B. That affiant is a member of the co-partnership consisting of himself and —— —— trading as —— —— and hereinafter designated as claimant. That said claimant does business at the place above set forth, and that affiant has subscribed the co-partnership name and is duly authorized by said firm to make, execute, acknowledge and verify this proof of debt and power of attorney.

(or as appears below.)

C. That he is an officer of Bronx Brass Foundry, Inc., a Corporation duly and legally organized and authorized to transact business. That he resides at the place above mentioned. That he is Treasurer of the said Corporation. That the seal affixed hereto is the seal of said Corporation. Said Corporation is hereinafter designated as the claimant.

II

That the above named Bankrupt was at and before the time of the filing of the petition in bankruptcy herein and still is justly and truly indebted to said claimant in the sum of $2,101.10. That the consideration of said debt is [fol. 4] a judgment in the sum of $2,085.44 entered on July 18, 1933 against the bankrupt, with interest at 4½% amounting to $15.66. That said amount is justly due and

owing. That no part thereof has been paid. That there are no offsets of counterclaims thereto. That deponent has not, nor has any person for or on behalf of said claimant, or to his deponent's knowledge or belief for the use or benefit of said claimant, had or received any security for said debt whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except such note or evidence of said debt, if any, as is attached to this document, except that the filing of this claim is not to be construed as a waiver of the right of the claimant to follow any of its property or proceeds thereof into the hand of whomsoever it may be, including the receiver and trustee in bankruptcy provided same was delivered through fraud or misrepresentation, or as a waiver of any other right of action or any other right than claimant has or may have against the Bankrupt, the Receiver or Trustee or any other person.

III

Said claimant hereby appoints Maxwell H. Goldstein, Esq., of No. 1440 Broadway, New York City, or their representatives and each of them, attorneys in fact, authorizing them and each of them to attend any and all meetings of creditors or adjourned meetings of creditors of the Bankrupt in any Court of Bankruptcy or before any Referee in Bankruptcy or elsewhere, and for said claimant and in the name of said claimant to vote for or against any pro-
[fol. 5] posal or resolution that may be submitted in reference to the Estate of the above named Bankrupt and in the choice of Trustee or Trustees and for said claimant to appoint such Trustee or Trustees. To accept or refuse any composition in or out of bankruptcy proposed by said Bankrupt. To receive, and collect any payments of dividends or fees or moneys due said claimant under any composition or otherwise and in general to take such action and do such acts, execute such consents for such claimant as said attorney may deem best, as fully as such claimant could do if personally present. And all powers of attorney heretofore executed by claimant in this proceeding are hereby revoked.

Bronx Brass Foundry, Inc., by Harry Friedman, Treasurer. (L. S.)

Sworn to before me this 25 day of September, 1933, said subscriber being known to me to be the person described in and who signed and swore to the above instrument and duly acknowledged that he executed the same.

(Individual Name)
Rose DeKempp, Notary Public, Kings Co.

(Verified by Harry Friedman, Sept., 1933.)

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO EXPUNGE CLAIM

To the Honorable John E. Joyce, Referee in Bankruptcy:

The petition of the Irving Trust Company, Trustee in Bankruptcy, respectfully shows and alleges:

1. That an involuntary petition in bankruptcy was filed herein on July 18th, 1933, and thereafter an order of adjudication was duly entered on August 10th, 1933 and the matter referred to the Hon. John E. Joyce, Referee in Bankruptcy herein, for all purposes.

2. That heretofore the Bronx Brass Foundries Inc. filed its proof of claim in the sum of $2,101.10 against this estate, which claim is on file in the office of the Referee in Bankruptcy herein.

3. That within four months prior to the date of the filing of the petition in bankruptcy herein, and while the bankrupt was insolvent and indebted to divers creditors of the [fol. 7] same class upon unsecured indebtedness provable in bankruptcy, and while knowing that the bankrupt was insolvent, said bankrupt transferred and paid over to the said Bronx Brass Foundries Inc. the sum of $1,000.00.

4. That the effect of said payments by the bankrupt to Bronx Brass Foundries Inc. was to enable said Bronx Brass Foundries Inc. to obtain the payment of a greater percentage of its debt than any other creditor of the said bankrupt of the same class and that the said payments to the Bronx Brass Foundries Inc. were avoidable preference under the

provisions of the bankruptcy act and amendments thereto and were likewise a preference under Section No. 15 of the Stock Corporation Law of the State of New York and the amendments thereto.

5. That the said Bronx Brass Foundries Inc. received the said payments aforementioned knowing or having reasonable cause to believe that the said bankrupt was insolvent or that its insolvency was imminent and that the said payments would effect a preference in violation of the National Bankruptcy Act and Amendments thereto and in violation of Section 15 of the Stock Corporation Law of the State of New York and amendments thereto.

6. That the said bankrupt has insufficient assets to pay in full its obligations and debts.

Wherefore, petitioner respectfully asks that the claim filed herein by the Bronx Brass Foundries Inc. in the sum [fol. 8] of $2,101.10, or any other claim or amended claim filed herein by said Bronx Brass Foundries Inc. be expunged on the ground and for the reason that the said Bronx Brass Foundries Inc. has received an illegal preference and for such other and further relief as may be just and proper in the premises.

Dated, January 5, 1934.

Irving Trust Company, by Joseph T. Stearns, Assistant Secretary.

(Verified by Joseph T. Stearns Jan. 5, 1934.)

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO PETITION

Bronx Brass Foundry, Inc., one of the creditors in this proceeding, for its answer to the petition:

1. Denies each and every allegation contained in paragraphs marked 4, 5 and 6.

Wherefore, Bronx Brass Foundry, Inc. requests that the petition for disallowance of its claim be dismissed with the costs of this proceeding.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE WITHDRAWING CLAIM

SIR:

Please take notice that Bronx Brass Foundry, Inc. does hereby withdraw its claim and proof of debt in this proceeding.

Dated: New York, May 18, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Office & P. O. Address, 1440 Broadway, Borough of Manhattan, City of New York.

To Hon. John F. Joyce, Referee in Bankruptcy, 70 Pine Street, New York City.

[fol. 11] IN UNITED STATES DISTRICT COURT

Statement of Evidence

HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

Before Hon. John E. Joyce, Referee

New York, January 26th, 1934, at 10 A. M.

APPEARANCES:

Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Mr. Sprague (Clerk).

Adjourned by consent to Friday, February 2nd, 1934, at 2 P. M.

ADJOURNED HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

New York, February 2nd, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Mr. Rosen.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.

Adjourned to Friday, February 16th, 1934, at 10 A. M.

[fol. 12] ADJOURNED HEARING ON OBJECTIONS TO CLAIM OF BRONX BRASS FOUNDRY

New York, February 16th, 1934, at 10 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Irving Trust Company, Trustee, by Aaron Rosen, Esq.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry, Claimant.

OFFER IN EVIDENCE

Mr. Rosen: I offer in evidence six checks totaling the sum of $900, representing payments made by the bankrupt to Maxwell H. Goldstein, the attorney for the claimant.
Mr. Goldstein: No objection.

(Marked "Trustee's Exhibit 1, February 16th, 1934." Comprising six checks.)

Mr. Rosen: I think Mr. Goldstein will concede there is another check of $100, making a total of $1,000?
Mr. Goldstein: Yes, I do so concede.
Mr. Rosen: That was paid within the four months' period —that was paid within four months of the date of the filing of the petition in bankruptcy?
Mr. Goldstein: What was the date of the filing of the petition?
Mr. Rosen: July 18th.
Mr. Goldstein: Yes; I will concede that for the moment. I think it is correct.

[fol. 13] FRED F. THURSFIELD, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Thursfield, will you please give the Stenographer your name and address?

A. Fred F. Thursfield; 130 Eastchester Road, New Rochelle.

Q. What is your business?

A. Salesman; general salesman.

Q. You are connected with what firm?

A. American Brass.

Q. The American Brass Company is a creditor in this estate?

A. It is.

Q. Were you in charge, in behalf of your firm, of its account with this bankrupt?

A. Yes.

Q. Now do you recall attending a conference at the office of Mr. Post, the attorney for the bankrupt, at which were present a representative from the Bronx Brass Foundry, and Mr. Goldstein, the attorney here?

A. I do.

Q. Tell us what was said there and who was there?

A. Mr. Palmenberg was there; representatives of the Bronx Brass.

Q. The claimant in this proceeding?

A. Yes; and myself.

Q. Was this gentleman, Mr. Goldstein, there?

A. Yes.

Q. And he was there, can you state, on whose behalf?

A. On behalf of the Bronx Brass Foundry.

Q. Now will you state just what took place at the meeting; what was said?

A. A statment that the Palmenberg——

[fol. 14] Mr. Goldstein (interposing): Pardon me; may I interrupt a moment? What date was this, did you say, it took place?

The Witness: Early in March; probably the first week in March, 1933.

Q. And what was said at that time?

A. A statement was made that the Palmenberg concern was bankrupt.

Q. Who made that statement?

A. I think I made that statement myself.

Q. And what was said after that?

A. That if an extension was granted, we believed it could be worked out. The meeting was called for the purpose of consulting with the largest creditor, outside of ourselves, which happened to be the Bronx Brass Foundry.

Q. Were there any figures submitted at that meeting?

A. As I recall it, figures were submitted, which I had.

Q. Well, do you have those figures with you now?

A. I have.

Q. May I see them, please?

A. (Witness produces paper).

Q. The paper that you have just handed me, was that given to anybody on behalf of the Bronx Brass Company at the meeting that was attended, concerning which you just testified?

A. Not that I recall. I know those figures were discussed at that meeting.

Q. The figures contained on this paper were discussed at that meeting? All of them were read off?

A. I cannot state positively on that; but they were discussed to the extent that the question of Palmenberg's claim [fol. 15] was gone into—that is, money advanced by Palmenberg to the company.

Q. What was mentioned in respect to Mr. Palmenberg's claim?

A. That my company had investigated and was confident that it was legitimate and represented actual money put into the business.

By Mr. Goldstein:

Q. Who said that, Mr. Thursfield?

A. I said that myself.

Q. You said that?

A. Yes.

By Mr. Rosen:

Q. Did Mr. Palmenberg mention the amount of his claim against his estate?

A. I think he did. I am not positive about it.

Q. Approximately what did he say was the amount of his claim?

A. $20,000.

Q. Was anything said by Mr. Palmenberg to the effect that he would subordinate his claim in the event that there was an extension?

A. Yes, sir.

Q. Well, what was said along those lines?

A. That he would subordinate any claim of his, or his family, provided an extension was granted or entered into by the creditors, so that the merchandise creditors would have preference.

The Referee: Sustained.

Mr. Rosen: I ask that it be marked for identification.

(Paper marked "Trustee's Exhibit 2 (Id.), February 16th, 1934." Comprising two sheets.)

[fol. 16] Q. Mr. Thursfield, will you state as best as you can recall, to what extent the figures referred to in Trustee's Exhibit 2 for Identification, were discussed or shown?

Mr. Goldenstein: I object to that as calling for a conclusion.

The Referee: Have him state what was said.

The Witness: There was a general discussion of the financial condition. As to just how detailed it was in regard to particular items. I would not attempt to say.

Q. Well, what was finally said in respect to the extension requested by Mr. Palmenberg in behalf of the bankrupt?

A. That they were not willing to enter into any extension until they further investigated the matter.

Q. Who was not willing?

A. The Bronx Brass Foundry.

Q. Well, what was said by the Bronx Brass Foundry at that time?

A. That they wished to investigate the claim of the Palmenberg people before they would come to any conclusion.

Q. And what happened after that meeting?

A. A committee was appointed——

Mr. Goldstein: I object to anything that happened after that meeting unless it appears that conversations were held——

The Referee: Yes; you will have to show knowledge by the claimant.

Q. Did you have any further conversation with Mr. Gold- [fol. 17] stein in respect to this matter at any time?

A. None other than immediately after the meeting, when he discussed with me the question of the Palmenberg claims, to some extent.

Q. And what did he say?

A. That he wished to look up the will of Mr. Palmenberg's father and go into the matter of how this money was advanced.

By the Referee:

Q. Now, Mr. Thursfield, will you state the substance of the entire conversation you had with Mr. Goldstein following this meeting of creditors, and recall all that you can?

A. There was a suggestion made that we, as the largest creditor take over——

Q. Well, just state all he said. Do not tell us what was suggested.

A. He asked us to take over the claim of the Bronx Brass Foundry.

Q. What did you say?

A. I said no.

Q. What did he say then?

A. As far as I recall that ended the conversation.

Q. You had no further conversation with him at that time?

A. No.

The Referee: All right.

By Mr. Rosen:

Q. Now, did you have any conversation subsequent to that meeting, with Mr. Goldstein or anybody else of the Bronx Brass Foundry, in respect to this matter?

A. No.

Q. Were there any meetings of creditors' committees, that were attended by Mr. Goldstein or anybody else on behalf of the Bronx Brass Foundry?

A. Not that I recall.

Mr. Rosen: Your witness.

[fol. 18] Cross-examination.

By Mr. Goldstein:

Q. Mr. Thursfield, will you tell us what was said, if anything, by Mr. Post and Mr. Palmenberg and Mr. Shapiro at this conference or meeting as you describe it, which took place in the early part of March, last year?

A. Mr. Palmenberg stated that he would subordinate the claims of the family; and that was substantiated by Mr. Post, provided the——

Q. (Interposing:) Tell us what Mr. Post said?

A. In what respect?

The Referee: In any respect.

Mr. Rosen: Your best recollection, I think; you don't have to remember the exact words.

The Referee: No; State the substance of what was said, as you can recall it.

The Witness: The substance was that they, Palmenberg—the Palmenberg interests, would subordinate their indebtedness, to the Palmenberg Company if an arrangement was worked out among the creditors for an extension; and that until such time as the creditors were paid in full, no payments would be made against any of their claims.

By the Referee:

Q. Now, was there anything else said? Do you recall anything said by Mr. Post? That is the question.

A. Well, that statement was also made by Mr. Post; and there was some discussion as to the length of time of an extension that would be required; and as I recall it, they thought a six months' extension would be sufficient.

[fol. 19] By Mr. Goldstein:

Q. Was anything said by Mr. Palmenberg at this meeting?

A. Well, other than I have just stated?

Q. Yes; you have related conversations without identifying the person who spoke. I want to know whether Mr. Palmenberg said anything?

A. Both Mr. Palmenberg—Mr. Palmenberg substantiated that statement which was made by Mr. Post.

Q. About what he would do concerning subordination; is that it?

A. Yes.

Q. That is all Mr. Palmenberg said?

A. He also answered your request as to the filing of his father's will.

Q. Did Mr. Shapiro say anything; the vice president?

A. There was also a statement made about some of the creditors having signified a willingness for an extension, or a willingness to enter into an extension.

Q. Did Mr. Palmenberg discuss the assets of J. R. Palmenberg's Sons?

A. There was some discussion at that time of a contract which I believe they had just got from one of their large customers.

Q. For how many thousands of dollars?

A. As I recall it, something around 14, 15 thousand; somewhere in that neighborhood.

Q. It was not forty thousand?

A. Forty? No.

Q. Was there a discussion about a $20,000 profit on the contract?

A. No.

Q. That is your recollection?

A. That is my recollection.

Q. Well now, have you told us everything that was said [fol. 20] by Mr. Palmenberg concerning the assets of the company?

Mr. Rosen: Everything that he remembers.

A. As far as I recall, yes.

Q. Have you told us everything that was said by Mr.—the vice president, Shapiro, on the subject of the assets of the company?

A. I do not recall what he had to say in that respect.

Q. Now did Mr. Post say anything concerning the assets of the J. R. Palmenberg's Sons corporation?

A. Well, he discussed about their being—having been cut into very extensively because of the loans that had been made to keep the business going; if that is what you mean.

Q. Loans made to whom?

A. Loans made by Palmenberg to the Palmenberg Company.

Q. And you say he said that that cut into the assets of the company?

A. They had reduced the assets—the quick assets, yes.

Q. Loans made by Palmenberg to the corporation had reduced the assets of the corporation?

A. Well, it had decreased the value, had it not?

By the Referee:

Q. What was said by Mr. Post in respect to the statement you just attributed to him: That the Palmenberg loans had cut into the assets. What was the substance of his statement?

A. The substance of his statement was that because of these loans which had been made by Palmenberg to the company, that there was not the value to the assets that there would have been had the business been conducted without [fol. 21] these loans. Because of these loans, there was less in the assets to the creditors—for the creditors, because they had to consider these loans.

By Mr. Goldstein:

Q. That is your recollection of what was said, is it?

A. Yes.

Q. Well, now, have you told us everything that was said by everybody who was there, as far as your recollection serves you now, Mr. Thursfield?

A. I believe there was a statement made by one of your clients, that this money had been guaranteed to him by Mr. Shapiro—or payment for merchandise had been guaranteed by Mr. Shapiro; something to that effect; or otherwise they would not have shipped it; but that I cannot be positive of.

Q. Have you searched your recollection now in telling us everything that was said about the assets of the firm?

A. I do not recall anything else that was said.

Q. All right. Now when did you receive this paper marked Trustee's Exhibit 2 for Identification?

A. I received that in March—in February.

Q. Had it been prepared by somebody you employed or your firm employed?

A. No; it had been prepared by their accountant.

Q. Had your firm, or you, ever received a copy of any statement ever made prior to that date by J. R. Palmenberg's Sons, Inc.?

A. We had never had a statement until in February of that year.

Q. You mean the statement which is marked as Trustee's Exhibit 2 for Identification, this paper (indicating)?

A. Yes.

Q. That is the first time you saw a statement?

[fol. 22] A. That is the first time we had a statement from Palmenberg's was when we got one in February.

Q. Now your recollection is clear, isn't it, that my clients and myself were not shown this statement, this paper marked Trustee's Exhibit 2 for Identification?

A. You were shown figures which we had. Whether they were those particular figures or the figures on this brown paper, I am not sure (indicating another paper).

Q. Well, let us see your brown paper, Mr. Thursfield?

A. (Witness hands counsel paper.)

Q. Now you have handed me a paper which is marked "J. R. P. Son's, Inc., Balance sheet as of March 1, 1933."

A. Yes.

Q. Is that the paper——

A. (Interposing:) Those are the figures that we had.

Q. Now, did you show that to me, or to Mr. Friedman, or Mr. Federov or anybody else, at this conference in Mr. Post's office?

A. As I recall it, those figures were there and the items were discussed.

Q. Did you show it to anybody?

By the Referee:

Q. Did you show them the paper that you have just handed to counsel?

A. My recollections are that I did.

By Mr. Goldstein:

Q. Whom did you show that to——

Mr. Goldstein: Let me interrupt one moment. Will you have this marked for identification?

The Referee: Mark it for identification.

[fol. 23] (Paper marked "Claimant's Exhibit A (Id.) February 16th, 1934.")

Q. Whom did you show Claimant's Exhibit A for Identification at this conference?

A. You saw those figures.

Q. Did you show this paper marked Claimant's Exhibit A for Identification to me?

A. I don't know that I handed it to you; but I quoted from figures that were in it, about the Palmenberg claim.

Q. You want us to understand that you talked at this conference, and you were the only one that talked about figures; is that it?

A. No; I won't say that.

Q. Well now, referring to Claimant's Exhibit A for Identification again, you want the Court to understand that what occurred was, that you discussed with those present at this conference, figures which happened to be in this report; is that it?

A. There was some discussion of figures, yes.

Q. You did not show this to anybody, did you?

A. To the extent of perhaps handing it to you?

Q. Did you hand this to me, or to anybody else?

A. No; but nobody asked for it.

Q. That is all we want to know.

A. You saw the figures there.

Q. Now you had two papers, two statements before you when you attended this conference at Mr. Post's office, didn't you?

A. I don't say that we had the second one—probably the second one there is one that came later; but in pulling it out of the package—this is the one we had (indicating)——

Q. (Interposing:) Wait a minute, Mr. Thursfield. Let us get this straight——

A. (Interposing:) This is the one we had——

[fol. 24] The Referee: Wait a minute. They have to be identified, Mr. Thursfield.

Q. You mean this yellow sheet, marked Claimant's Exhibit A for Identification, may not have been in your possession at that conference (indicating)?

A. Yes, that was in my possession.

Q. What about Trustee's Exhibit 2 for Identification? Was that in your possession (indicating)?

A. That might not have been, no. I thought when I first looked at it, that it was a copy of the others; but it is not.

Q. Well now, what makes your memory straight on these two exhibits, Mr. Thursfield—what did you just do to help your recollection?

A. I had them pinned together here—these statements were pinned together here.

Q. Without looking to see whether there was any variation between the statements?

A. What?

Q. Without looking to see whether there was any variation between the statements with respect to assets?

A. I have not been over these statements——

Q. (Interposing:) Did you do it just now, I mean?

A. No.

Q. Had you any memorandum there which helped you refresh your recollection as to whether these statements were present in your possession at that conference?

A. That one on the yellow paper was.

The Referee: That is Exhibit A for Identification?

The Witness: Exhibit A was.

Q. In your possession?

A. Yes.

[fol. 25] Q. Now what did you look at now that you have before you, that helped to refresh your recollection as to what you had?

A. Both of these papers were attached to a letter here, written on February 23rd.

Q. Written by whom to whom?

A. By myself to my company.

Q. I see. Did that help to refresh your recollection?

A. What?

Q. (Question repeated.)

A. No.

Q. But looking at it enabled you to tell us now that one of these papers was in your possession at the meeting?

A. It absolutely was. We had these brown figures before the meeting.

Q. Do you recall whether Mr. Post, Mr. Palmenberg, Mr. Shapiro or anybody else gave a detailed statement to my client, the Bronx Brass Foundry, or to me, at this conference?

A. I do not think they did.

Q. It was discussed at this conference, was it not, the purpose of J. R. Palmenberg's Sons to continue in business; was it not?

A. Yes.

Q. And complete contracts which they had on hand?

A. Yes, sir.

Q. And they asked the creditors not to press them; is that it?

A. They asked creditors not to press them, yes.

Q. Was it also discussed at this meeting, or mentioned, that there were lots of moneys due to J. R. Palmenberg's Sons that were due from customers in the West and in the Middle West, where banks had been closed?

A. Not to my recollection—I would say no.

Q. You were going to say "From my recollection"—what was it?

[fol. 26] A. I said, not to my recollection was there any discussion of moneys, or any considerable moneys.

Q. Wasn't there anything said about how much of accounts receivable there were?

A. The amount of accounts receivable was mentioned.

Q. And wasn't there something said concerning these accounts receivable; that some were unable to pay and they were unable to collect, because banks had been temporarily closed?

A. Yes.

Mr. Goldstein: That is all.

Redirect examination.

By Mr. Rosen:

Q. Mr. Thursfield, I recall you testifying before that mention was made that Palmenberg's was broke and that they wanted an extension; is that correct?

A. Yes.

Q. There is not any doubt about that?
A. There is not any doubt.

The Referee: He stated that.

By Mr. Goldstein:

Q. Who said that Palmenberg's was broke?
A. I said that.
Q. Nobody else did at this conference, did they?
A. I said that in our opinion——
Q. (Interposing:) I asked you whether anybody else said it?
A. I don't know that they used the same words, no.
Q. Did anybody else say that in words or in substance?
A. I would think from——
Q. (Interposing:) No; yes or no, please?

Mr. Rosen: What you recall.

[fol. 27] By the Referee:

Q. Did anybody say that——
A. (Interposting:) No; not in the same words or substance.

Mr. Goldstein: All right; that is all.

Q. Did the Bronx Brass Company or any of its representatives ask you for any figures on any item?
A. Any specific figures?
Q. Yes.
A. No.

The Referee: All right.

By Mr. Rosen:

Q. You stated before that you made a statement in respect to your opinion that they were broke?
A. Yes.
Q. Now who did you make that statement to?
A. It was made in the meeting.
Q. By you?
A. By me.
Q. And did you state what your opinion was based on?
A. On the fact of the moneys that were due to Palmenberg—the Palmenberg family; and the fact that their state-

ment showed a loss for the previous years; and the figures which were submitted to us had shown a loss over previous years.

Mr. Rosen: That is all.

By Mr. Goldstein:

Q. Did you state that as the basis for your opinion at this conference?

A. As I recall it, I did.

Q. You had looked at the statement which had been marked as Claimant's Exhibit A for Identification, before you came to the meeting, hadn't you?

A. Yes.

[fol. 28] Q. And that had not shown that the bankrupt—that J. R. Palmenberg's Sons was bankrupt at the time, had it?

A. In our opinion, it did.

Q. Did it show by the statement, I asked you?

A. By the statement?

Q. Yes?

The Referee: Wait a minute. He answered that question. He said, "In our opinion, it did."

Mr. Goldstein: I asked what the statement showed.

The Referee: You asked him whether or not the statement showed.

Mr. Goldstein: Exactly.

The Referee: And he said "In our opinion it did."

Q. Now I press the question again and ask you: Did the statement show that the company was insolvent?

Mr. Rosen: I object to the question. It has been answered.

The Referee: Sustained.

Mr. Goldstein: Exception.

The Referee: The statement will speak for itself.

Mr. Rosen: I will consent to the statement going into evidence.

Mr. Goldstein: I have not any objection.

The Referee: Put it in.

Mr. Goldstein: Of course it is understood by my agreeing to this, that I do not agree that it is true, nor do I acknowledge that we saw it.

[fol. 29] (Statement heretofore marked Claimant's Exhibit A for Identification, received in evidence and marked "Trustee's Exhibit 3, February 16th, 1934.")

Q. Did your company continue to do business with the Palmenberg Company after this conference?

A. We did.

Q. I beg your pardon?

A. We agreed to fill an order which we received.

Q. Were you paid for that order?

A. No, sir.

Q. When did you deliver your goods?

A. There were some deliveries made—some of them had been made just prior to that; and there was a shipment made, as I recall it, about the 10th of March, which completed it.

Q. Had you received any payments from Palmenberg's after this conference?

A. Not after that conference, nor before it—immediately before it. The thing that brought it up was——

Q. How much did you say Palmenberg's was indebted to your company at the time this conference was held?

A. Between $4,000 and $5,000.

Q. Was that what you said at the meeting?

A. As I recall it, it was.

Q. Did you say that it was about $10,000, at the meeting?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You are positive about that?

A. Absolutely.

Q. That is the one thing you have a definite recollection about?

A. Because they never owed us that amount of money.

Mr. Goldstein: You may proceed.

[fol. 30] By the Referee:

Q. Were there any other creditors present at this meeting besides your company and the Bronx Brass Company?

A. There was another creditor that came in before we left Mr. Post's office.

The Referee: All right.

The Witness (continuing): I do not know that he was there at the start of the meeting.

By Mr. Rosen:

Q. Mr. Thursfield, you testified that you made shipments to fill an order after the statement by you that the company was bust, bankrupt. How do you account for that?

Mr. Goldstein: I object to that; his reason.
The Referee: Sustained.

Q. Was any statement made at the meeting that you were going to ship or fill that order?

Mr. Goldstein: I object to that as leading.
The Referee: I will allow it. It is redirect examination.
Mr. Goldstein: Exception.

A. I do not think it was discussed.

Mr. Rosen: That is all. Mr. Post, will you take the stand please?

[fol. 31] Walter L. Post, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. You are an attorney, Mr. Post?
A. Yes.
Q. Practicing for how many long years?
A. Twenty-five.
Q. You are also an officer of the bankrupt company?
A. Yes.
Q. What officer?
A. Secretary.
Q. And besides being an officer, you are active as their counsel; isn't that correct?
A. Yes.
Q. Did you personally attend the meeting that was held at your office some time in March, 1933, in respect to this matter?

A. It was either the end of February or the first of March; it was about the first of March.

Q. And do you recall who was present at that meeting?

A. Mr. Thursfield, Mr. Goldstein and two officers of the Bronx Brass Company; I cannot recall their names, just now.

Q. By Mr. Goldstein, you refer to this gentleman? (Indicating Maxwell H. Goldstein).

A. Yes.

Mr. Goldstein: Federov and Friedman are the names.

The Witness: That is right; Mr. Federov and Mr. Friedman; Mr. Maxwell Goldstein; Mr. Palmenberg, Mr. Shapiro and I. I mentioned Mr. Thursfield, didn't I?

Q. Yes, you did.

A. And later during the session, Mr. Landes, who was a [fol. 32] creditor having supplied coal, came in; but I think it was about an hour after we started in.

Q. Now, will you state as best as you can recall it, just what transpired at that meeting; what was said, and who said it, and everything else?

A. Why, we told them that the company had come to the point where it was not able to pay its way; that Mr. Palmenberg and members of his family had, for several years met financial stringency by making loans to the company; and because of the fact that he was pretty well out of liquid assets, his money was tied up in mortgages and in real estate, upon which he could not realize, that it was impossible for him to continue to advance money to the company. We explained that his mother had put in a certain amount and that his grandmother had put in $7,500. We said that we felt that the firm of Palmenberg's which had been in existence for eighty years and was very well regarded amongst its creditors, could pull through; that we were right in the beginning of the season for 1932; that we felt optimistic——

Q. (Interposing:) 1933.

A. 1933, yes—that we felt optimistic of business—future business; we had succeeded in getting an order from a large concern in the West, amounting to about $14,000, I think, which we felt indicated a prospect of future business; and that we had explained the situation to our largest creditor, which was the American Brass Company; we were indebted to them to the extent of about $4,500; that

Mr. Palmenberg had been to Waterbury to confer with them, and to explain the situation to them, and that Mr. Thursfield, as their representative, had been allowed full access to our books and had gone over the books and was [fol. 33] there prepared to explain anything, from the creditors' standpoint. We had a statement there—a recent statement, showing what the assets were; and we discussed that with Mr. Goldstein—I do not think his clients took very much part in it; he discussed it. The statement showed a machinery valuation—machinery and moulds, of around $50,000; and inventory of raw materials of about $30,000. It showed an item of good will there, which I explained had no real value behind it: $400,000.

Q. $400,000?

A. $400,000.

Q. And you stated that it had no real value behind it?

A. That it had been carried on the books; and we had discussion that that had at one time represented patents and trade-marks that had no longer any value.

Q. Were the liabilities mentioned?

A. We discussed the liabilities; and I said that the Palmenberg family had put in somewhere around 230—$240,000; that they were willing, if the creditors would work along and grant an extension of time, they were willing to subordinate this claim so that the merchandise creditors would come out first. There was just a general discussion of figures of the company.

Q. Was there anything stated about the company being insolvent or bankrupt or unable to continue?

A. I do not recall that those words were used. We said that we could not continue unless there was a definite extension of time for a period from the creditors; but we assumed that the figures which were before us all spoke for themselves, that the company was insolvent as shown by the statement.

[fol. 34] Mr. Goldstein: I move to strike out the last part of the answer.

(Answer read.)

The Referee: Strike out what he assumed.

Q. What happened after that meeting, Mr. Post?

A. A copy of the statement which we had there, which had been prepared by the accountant for the company, Mr.

Schmelkin, was furnished to Mr. Goldstein, at his request. He also wanted the past three years' statements, operating statements and statements of the company, covering the past three years; but they were not furnished to him.

Q. Did you prepare an extension agreement?

A. Well, I had several talks with Mr. Goldstein about this——

Q. (Interposing:) Well, will you state what those talks were, please?

A. Generally urging him to agree to an extension for some period of time, or to the general extension of his indebtedness.

Q. And what did he say?

A. And for, oh, several days, he was rather undecided as to what could be done. He said that his clients had not dealt very long with the Palmenberg's Company and they felt that they were entitled to preference on that account, over the older creditors.

Q. Did he use that language?

A. Yes.

By Mr. Goldstein:

Q. Will you fix the time, please, of this conversation, Mr. Post?

A. I imagine, Mr. Goldstein, that it took place—that conversation or something substantially like it, took place [fol. 35] half a dozen times between the first day of March and the middle of June.

By the Referee:

Q. Where were the conversations?

A. Over the telephone and in Mr. Goldstein's offices; he was at 2 Lafayette Street, at first, and then he moved during the Spring to, I think, 1440 Broadway.

Mr. Goldstein: That is right.

Q. Well, can you say whether this particular conversation, where he said that his clients had only been dealing with the bankrupt a short time, took place at his office or over the telephone or at your office?

A. The only time that I can place definitely, my recollection is that it took place in that first meeting there in my office; but——

Q. That was the meeting at which the American Brass attended?

A. Attended; that was around March first; but I do recall the statement being made, I would fix the time about the first of June, in Mr. Goldstein's office.

By Mr. Rosen:

Q. Now, was an extension agreement definitely submitted to the creditors?

A. Yes.

Q. And did the Bronx Brass Company refuse to sign that agreement?

A. Yes.

Mr. Goldstein: Well, now, wait a minute. May I object to this——

The Referee: Fix the time and place.

Mr. Goldstein: Let us have a copy of this paper, if he [fol. 36] refers to a paper; I think the paper is the best evidence.

Q. Was suit subsequently commenced by the Bronx Brass Foundry against Palmenberg's Sons?

A. Yes.

Q. And at the commencement of that suit did you talk to Mr. Goldstein?

A. Well, you mean about the time?

Q. Yes?

A. I was in touch with Mr. Goldstein very frequently, both before and after that suit was commenced.

Q. And when that suit was first commenced, did you have a conversation, and if you did, will you state just what that conversation was?

A. Why, from time to time I urged Mr. Goldstein to get his clients to come into that arrangement; and I said, unless the creditors did come in and did grant this extension, that the company could not go on, could not continue.

Q. And it was after that suit was started—after the commencement of the suit, that the $1,000 was paid to the Bronx Brass; is that correct?

A. Yes, sir.

Q. And it was paid by postdated checks, was it not?

A. Some of them were, and some of the checks were—may I refer to my file?

Q. Yes.

A. (After reference to file) Summons was served on the company on March 15th; and between that time and April 4th, when the time to answer expired, I had several talks with Mr. Goldstein urging him to give his consent to this extension agreement. On April 4th, the time to answer was extended to the 6th, when an answer was interposed.

[fol. 37] Q. Is there anything further that you recall in respect to any conversation you had with Mr. Goldstein in regard to the payment or the financial condition of the bankrupt?

A. It is my recollection that the first payment that was made to Mr. Goldstein was made after April 12th, 1922—after April 15th, 1922, when a motion for a summary judgment was made in the action; and——

Q. (Interposing:) Did you have any conversation with Mr. Goldstein at the time of that payment?

A. There was no hearing in that. I talked to him and told him that we were meeting with considerable success in getting the creditors to come into the agreement—the extension agreement. It had been circulated and a large proportion of the creditors had accepted it and agreed to sign it. He said that——

Q. Have you a copy of the extension agreement?

A. Yes; I have it here. (Indicating paper.)

Q. Is there anything else that you recall in respect to that?

A. I think I did not finish my answer to that last question. I then talked to Mr. Goldstein and he said that he would not consider this extension agreement until his account had been reduced further, or his clients' account; and that he was going to press this action unless he received some payments. Payments were commenced, I think right after that, and were made to him; and from time to time, as a payment was made on account of the agreement—on account of the debt, the motion for a summary judgment was adjourned.

Q. Now, Mr. Post, do you know of your own knowledge whether the bankrupt company at the time of the meeting in March was able to meet maturing obligations?

A. It was not.

[fol. 38] Q. Current liabilities were accruing and they did not have any current assets to pay it; is that correct?

A. Right.

Q. And was that fact mentioned?

A. Oh, yes; that was the reason we were asking for the extension.

Mr. Rosen: All right, that is all. Your witness.

Cross-examination.

By Mr. Goldstein:

Q. Mr. Post, have you got the paper with you which you say you quoted from in giving figures concerning the assets and liabilities of Palmenberg's Sons?

A. No, I have not. I do not know just which one of the statements prepared by the accountant was used.

Q. Was any statement shown to anybody there on behalf of my client or myself?

A. Yes.

Q. What statement was that?

A. A statement prepared by Mr. Schmelkin, the accountant, about the first of the year 1933. I would say that it had the same figures that are on that white sheet Mr. Rosen has (indicating paper).

Q. Have you got that paper here?

A. I have a duplicate of that paper.

Q. I ask you if you have the paper which you say you showed to my client and me, at this conference in your office in the end of February or the beginning of March?

A. I am unable to definitely recall just what paper or just what statement it was that we had at that time.

Q. As a matter of fact, weren't you asked to give a statement to them?

A. A statement for the three year——

[fol. 39] Q. (Interposing:) No; of the assets and liabilities of the company as they were then?

A. Yes.

Q. Did you give it?

A. Yes.

Q. Well, was it in writing or was it orally?

A. It was a copy, I believe, of that white paper Mr. Rosen has.

Q. Did you give me a copy, or my clients a copy of it, Mr. Post?

A. I believe it was mailed to you.

Q. Have you got any memorandum in your file which will make definite the statement which you now make, Mr. Post?

A. No; there is no letter that I have here covering it; but it was either handed to you or mailed to you a day or so later.

Q. After the conference, you say?

A. Either that same day or the next day.

Q. Well, will you describe that paper please, so we will know what it was that you say you handed to me?

A. The paper I am talking about I believe is a duplicate of—may I have that, Mr. Rosen, please?

(Mr. Rosen hands Mr. Post a paper.)

The Witness (continuing): Is a duplicate of Trustee's Exhibit 2 for Identification.

Q. And you say you gave me a copy of it, sir?

A. Either gave it to you or it was mailed to you that day or the next day.

Q. Well, is there anything that you have in your files with you which will help to refresh your recollection now as to which it was?

A. No.

Q. Nothing at all?

A. No; I do not recall. I remember it being furnished to you, but I do not remember how.

Q. Now, Mr. Post, coming back to this meeting at your [fol. 40] office, did you or anybody there say in words or in substance that the Palmenberg Company was bankrupt?

A. No; except that we stated that it could not meet its obligations; but the word "bankrupt" was not used.

Q. You did not say that the company was insolvent?

A. We said it was unable to pay its bills.

Q. I asked you whether you said it was insolvent?

The Referee: In those words.

A. We did not use those words.

Q. Did you discuss the assets and liabilities of the company?

A. We did.

Q. And did you attempt to show by the discussion of those assets and liabilities, that the company was solvent?

A. We said that the solvency of the company depended entirely upon the attitude of the Palmenberg family; that

if they pressed their obligations, that the company was unable to pull out.

Q. You mean it would be unable to pull out if they asked for it the same way as any other creditor had asked for the money; is that it?

A. Right.

By the Referee:

Q. And there was then $230,000, owing to the Palmenberg family, you say?

A. Between $230,000 and $240,000.

By Mr. Goldstein:

Q. You mean that if all the creditors had asked for the money, they would not be able to get their money when they wanted it; is that it?

A. No.

[fol. 41] Q. The company was still operating when that meeting was held, was it not?

A. Oh, yes.

Q. And it still had a bank account, did it not?

A. Yes.

Q. Now, wasn't it the purpose of your remarks to convey to my clients and to me the purpose that the firm was solvent and that if given an extension it would continue to live and pay its obligations in full?

A. No. The thing we tried to convey to the creditors was——

Q. (Interposing:) Now, there were only two creditors there, weren't there?

Mr. Rosen: I suggest you let him answer the question.

A. There were three creditors there. I don't recall whether Landes was there during the time we discussed that or not; but we made it very definite that the Palmenberg family wanted to see the merchandise creditors preferred over their claim if they gave the business a chance to pull out. We believed that business was improving; we had had quite a definite uplift in business the early part of the year and we felt that we could pull out; and at first we asked for a six months' extension; and later extended it to one year. We thought we needed a year's extension of time, and we offered, if the creditors would—if the mer-

chandise creditors would cooperate and grant that extension, we offered to subordinate the claims of the Palmenberg family—I think we did not offer to subordinate Mrs. Ordermann, Ted's grandmother's claim—well, at that time there was no offer to subordinate his mother's or his grandmother's claims; it was just Ted Palmenberg's claim entirely.

[fol. 42] Q. Well, now, I ask you again Mr. Post: Did you say in words or in susbtance that the company was solvent?

A. We explained the situation——

Q. (Interposing:) Did you say that, in words or in substance?

A. We did not use those words. Any lawyer would understand, from what we said, that the company was insolvent.

Mr. Goldstein: I move to strike that out.

Mr. Rosen: I object to its being stricken out.

Mr. Goldstein: That is an opinion, sir.

The Referee: Well, you are asking him—there may be a difference of opinion as to whether he said it is substance. Now ask him whether he said it in form.

Mr. Goldstein: What he has said is his opinion of what I might have understood.

The Referee: That is just the reason you should not ask him if he stated it in substance, because you and he may disagree on the substance or the effect of the substance.

Mr. Goldstein: That is answerable, if your Honor please, by yes or no.

The Referee: Well, ask him whether he said that in form.

Q. Did you say that in form, Mr. Post?

The Referee: That the company was insolvent.

A. I cannot definitely say so. I do not think I did. I tried very hard to keep away from that.

Q. Now, did you tell us—did you tell my clients, and did [fol. 43] you tell me, that the company was in difficulty because accounts receivable from the Middle West and the West had not been able to pay because banks were being closed and that you needed time because of that fact?

A. That was one of the reasons, yes.

Q. One of them? Wasn't that the principal reason?

A. No; there were various reasons.

Q. Now do you want the Court to understand that you told me and my clients, and if you please, Mr. Thursfield from the American Brass & Foundry Company, that this company was insolvent and you wanted the creditors to give an extension on that ground?

A. I think I have answered that I did not use the word "insolvent." I explained the facts of the company to you. You stated you were an accountant as well as a lawyer, I remember, and you said that you could understand what that meant; and we had a long discussion over the figures. I explained that it was impossible for the company to go on as it was; that it had to have an extension of time; that unless the creditors would agree to this extension of time, we would have to wind up and that there would be very little for the merchandise creditors then, because a very large proportion of the indebtedness was to the Palmenberg family; but they would subordinate that debt if the creditors played along and gave them time. Now that was the substance of our talk.

Q. You meant, if somebody filed a petition in bankruptcy then and there; is that it?

A. Certainly.

Q. Is that what you said?

A. I do not recall saying that.

Q. I see.

A. I remember discussing it with you.

[fol. 44] Q. Well now, the picture you gave of assets and liabilities showed that the company was solvent, did it not?

A. It did not.

Q. Well, what were the figures which you quoted to us?

A. The company had machinery——

Mr. Goldstein (Interposing): Let it appear on the record that Mr. Post is not looking at any memorandum now. Go ahead, Mr. Post.

Mr. Rosen: Well, will you suggest that he does look at a memorandum?

Mr. Goldstein: No, I just want the record to show that.

A. I think I am fairly familiar with the figures. I have lived with this thing for about three years.

Mr. Goldstein: All right.

A. (Continuing:) The company had machinery, which it carried on the books roughly at $50,000, machinery and fix-

tures. I know we discussed that figure and we said, "You know, if the company is wound up, that has but little value." It had accounts receivable around $15,000, $16,000. A higher figure on the books, but there was quite a large reserve carried for doubtful accounts. It had an inventory of $30,000. It had an item on the books, which had been carried I think from the inception of the company, of good will, $40,000. That, as I recall it, was the picture of the assets.

By Mr. Rosen:

Q. And what was the picture of the liabilities?

A. The liabilities was the indebtedness to the Palmenberg family of about $230,000—a little over that.

[fol. 45] Q. What else?

A. There were merchandise creditors of about $25,000. There were other creditors of, oh, $15,000.

Q. Was there accrued payroll?

A. I was just trying to think when that came in.

The Witness: At that time, it is a little hard for me to figure that in at any one particular time—at that time I think there was accrued payroll of three or four——

By Mr. Goldstein:

Q. Did you state that the item of $50,000 for machinery and fixtures was the fair value to the company as a going concern but would not be worth that much at a sale—at a forced sale?

A. I think so.

Q. Were you an officer of this bankrupt corporation?

A. Secretary.

Q. How long were you secretary, Mr. Post?

A. About two years, at that time.

Q. And how often did you attend at this place of business of Palmenberg's Sons?

A. Almost daily.

Q. And was there any substantial change in the condition of the company from January 1, 1933, until March 1, 1933?

A. A slight improvement.

Q. There was an improvement?

A. Yes.

Q. So that at the time this meeting was called at which I was present, and my clients' officers, and Mr. Thursfield, the company had shown an improvement over the statement of January 1, and that was the statement which you say you gave me a copy of (indicating)?

A. Yes; that is the one.

[fol. 46] Q. Now this statement—I ask you to look at it and tell us whether that shows the company to be solvent on January 1, 1933, or not? Whether this statement shows that (handing)?

A. I would not say so.

Q. Well, what does the statement show with respect to the value of the capital stock on January 1st?

A. The value of the capital stock shows a deficit account of $500,946.56.

Q. And that means as against a total valuation of how much?

A. $765,600.

Q. Now that produces a net value of some more than $200,000, doesn't it? Isn't that right according to that statement?

A. That is the result you get when you subtract these figures.

Q. So that the net value of the corporation on January 1st, according to that statement, was $200,000; isn't that right, Mr. Post?

A. With that explanation, that is true.

Q. And that condition had improved in March, the beginning of March, hadn't it?

A. These figures had not improved very much. The condition of the company had improved because it was a going business with——

Q. (Interposing:) Now had this company—I am sorry if I interrupted you.

A. (Continuing:) It was a going business and it looked as though it was going to go ahead and have a good season.

Q. Now Mr. Post, had Palmenberg Sons, this bankrupt corporation, made any payments to any other creditors between January 1, 1933, and March 1, 1933?

A. Yes.

Q. How much would you say was paid out between January 1, 1933, and March 1, 1933?

A. I cannot recall.

Q. Have you any idea?

A. No.

[fol. 47] Q. Now how much money was paid out by this bankrupt corporation between March 1, 1933, and the date of the filing of the petition in bankruptcy?

A. The books will show that. I do not recall.

Q. Have you any idea at all?

A. No.

Q. You know that other creditors were paid, too, between March 1, 1933, and July 15th, 1933?

A. Why yes; payments were made. I had very little to do with the actual physical payment.

Q. Now let us get this straight, Mr. Post. People continued to sell goods, didn't they, to the company

A. Yes.

Q. And continued to render monthly statements?

A. Yes.

Q. And continued to receive payments, isn't that right?

A. Some of them did. I think that the payments during that last period of three or four months, I think there was very little money that was paid out to creditors except under pressure.

Q. Well, there were others besides the Bronx Brass Foundry that were paid between that period of March 1 and July 15?

A. (No answer.)

By the Referee:

Q. Well now, are you speaking of creditors who were such on March 1st, or of creditors who extended new credit or who became creditors in the first instance after March 1st?

A. I think there were both classes. The feeling among the creditors generally was very good; though——

The Referee: Well, that is an answer.

The Witness (Continuing): They were willing to work along with us under those circumstances.

[fol. 48] The Referee: Put the question.

By Mr. Goldstein:

Q. Now, Mr. Post, I show you a letter dated May 19th, 1933, and ask you whether it bears your signature (handing)?

A. Yes.

Mr. Goldstein: I offer it in evidence.

Mr. Rosen: No objection.

(Marked "Claimant's Exhibit B, February 16th, 1934.")

Q. Did you have any conversation with me prior to sending that letter to me, Mr. Post?

A. I had several of them.

Q. Did you have one immediately preceding the sending of that letter?

A. Yes.

Q. Did you talk to me by telephone?

A. And in your office.

Q. Were you asked whether the company was solvent then?

A. (No answer.)

Q. Why the hesitation, Mr. Post?

A. Because I cannot recall. My impression is yes.

Q. I asked you whether they were solvent, didn't I?

A. Yes.

Q. And you told me they were?

A. I told you the facts as we had them there.

Q. Didn't you say that they were solvent, Mr. Post?

A. I think it was at that time I said no, that I had begun to despair pulling them through; and you said you were going to get yours; that you were going to be the dog in the manger, if necessary.

Q. You did not say that they were insolvent, did you?

A. I think I did.

Q. You said they were insolvent at that time?

A. I did.

[fol. 49] Q. And then you followed it up with the letter dated May 19th, which has been marked Claimant's Exhibit B in evidence here?

A. May I see that letter? If that is the letter, I didn't see it. (After examining Claimant's Exhibit B.) Yes; there was a stipulation made also on that day.

Q. It bears the same date, doesn't it?

A. Yes.

Q. Now does that help to refresh your recollection as to whether you said they were solvent or insolvent?

A. The more I think of it, the more I recall telling you that the concern was hopelessly insolvent and I had no hope, or very little hope to pull them out.

Q. Nevertheless you sought to obtain a delay in the payment—or the entry, rather, of a judgment on behalf of the Bronx Brass Foundry in the action in the Supreme Court——

Mr. Rosen (Interposing): I object to that.
The Referee: Sustained. It is immaterial.
Mr. Goldstein: Exception.

Q. You did say in that letter of May 19th, 1933, that you "confirmed the conversation had yesterday and that no judgment had been entered." Is that right?

Mr. Rosen: The letter is in evidence, if your Honor please,
The Referee: Sustained.
Mr. Goldstein: Exception. This is cross examination, if your Honor please.

(After discussion, off the record.)

The Referee: You may inquire as to what preceded the writing of that letter.

[fol. 50] (After further discussion, off the record.)

Mr. Goldstein: May I have an exception?

By the Referee:

Q. Did you have any conversation preceding the writing of that letter, with respect to whether there were any judgments unsatisfied of record against the bankrupt?
A. Yes, sir.
Q. With whom?
A. Mr. Goldstein.
Q. When and where was that conversation held?
A. In his office, 1440 Broadway.
Q. State what the conversation was?
A. The motion for summary judgment had been adjourned from time to time. I think it was due——
Q. Well no; just tell us what was said; never mind the background?
A. I asked him if he would not give us further time. I said that 50 per cent approximately of the creditors had agreed to come in and sign this extension agreement; he said no; that he was not willing to give further time; that he was going to press and get the money for his clients;

that was the only thing that he was interested in; and he was not going to sign any agreement. As a matter of fact, he said, I believe——

Q. What did he say about giving you a further extension on this motion?

A. He said that he would not do so. So we entered into a stipulation, which I have here. In that letter he asked me—he said, "I understand that there has been a judgment entered in favor of Palmenberg against the company." I said, "If there has been, I did not handle it and I don't know anything about it." As a matter of fact, I said, "I would not make an arrangement with you for [fol. 51] further time here if there was any judgment-creditor that was going to take any advantage of this delay." I said, "I will look it up and I will confirm it." And I did, and that letter is the result.

By Mr. Goldstein:

Q. Now Mr. Post, does that help to refresh your recollection as to whether you were asked whether they were then solvent?

A. It does, very clearly. May I see those checks? Are they in evidence?

Mr. Rosen: Yes. (Handing witness Trustee's Exhibit 1 of this date, comprising six checks.)

Mr. Post (after examining checks): You at that time refused to receive further checks unless they were personally endorsed by the officers of the company. You said that a number of checks had bounced back and that you did not think that you were going to get your money; and I said that I would not endorse any checks for the company; that I would not let Mr. Palmenberg get any deeper than he was. I put it up to Mr. Shapiro, to see what he would do. I arranged with Mr. Shapiro to come to your office; and he did so, and we finally agreed that four checks would be issued, some of them postdated, and that Mr. Shapiro would countersign—or would endorse two of them, for $100 each, and you would take the chance on the other two in getting your money out.

Q. That called for a delay of how many weeks, Mr. Post?

[fol. 52] Mr. Rosen: I think the question is indefinite. I do not know what it means.

The Referee: Delay of what? In the entry of the judgment or the stipulation?

Mr. Goldstein: In the entry of the judgment.

Mr. Rosen: I consent that the stipulation go into evidence, if your Honor please.

Mr. Goldstein: That is agreeable to me.

The Referee: Mark it.

(Paper marked "Trustee's Exhibit 4, February 16th, 1934.")

Mr. Post: May I refresh my recollection for a moment from this stipulation? (After examining Trustee's Exhibit 4 of this date.) Five weeks.

Q. Had you, in that conversation with me on May 19th, 1933, mentioned the fact that there was a confession of judgment in your possession executed by the company to T. C. Palmenberg?

A. I said there was one in existence.

Q. Did you say who had it?

A. I probably said I had it.

Q. Did I say to you, in words or in substance, that I wanted a letter from you assuring me that no judgment had been entered at that time, so that my client would not be tricked out of its money?

A. No.

Q. Did you promise to me that you would not do anything with this confession of judgment so as to avoid the payment of my client's claim?

A. I would not put it that way. I did not promise. I said that I was determined to save the company if I could and [fol. 53] that it was not my intention to file this confession of judgment until I was satisfied that I had given up all hope of saving the business.

Q. And didn't you state to me, Mr. Post, that the reason you had a confession of judgment executed by Mr. Palmenberg was that you would thereby be in a position to club any objecting creditor into submission if he did not agree to give you an extension of time?

A. I think I went further than that. I think I said it was mainly executed so as to handle you.

Q. I see; and it was for the purpose of keeping alive an insolvent concern; is that it, Mr. Post?

A. Right.

Q. And you understood that I, as an attorney, would, after hearing a statement such as you now say you made, execute the stipulation dated May 19th, 1933, and which has been marked as Trustee's Exhibit 4 in evidence; is that it, Mr. Post?

A. Will you read the question again, please? Just the first part of it. I did not quite get it.

(Question read.)

A. I so understood, and you did execute it.

Q. After you made such a threat; is that it?

A. I did not make any threat.

Q. You made the statement you say you did?

A. I stated a fact.

Q. Now Mr. Post, you the the attorney for the bankrupt here, aren't you?

A. Yes.

Q. Did you file schedules on behalf of the bankrupt?

A. I did.

Q. Is the Bronx Brass Foundry, Incorporated, among the creditors whom you scheduled?

A. I think so.

[fol. 54] Q. And you scheduled them for the balance of the debt upon which a proof of debt has been filed by the firm of Bronx Brass Foundry, did you not?

A. I think they were scheduled for the amount of the judgment they eventually entered.

Q. Yes. Well now, you knew when you scheduled those debts that the Bronx Brass Foundry, as you say, had received a preference?

The Referee: It does not make any difference, does it? It was a payment.

Mr. Goldstein: The purpose of this, if your Honor please, will be brought out in a moment, if you will bear with me.

The Referee: Yes; I will give you a chance to show me the relevancy.

Mr. Goldstein: Yes, you will have it in a moment.

Q. Did you understand it at that time, Mr. Post?

A. Certainly.

Q. Did you list the Bronx Brass Foundry among those—(withdrawn). When for the first time did you communicate with the Trustee to inform the Trustee that the Bronx Brass Foundry had received a preference, as you claim?

A. When I was asked about the facts of the payments.

Q. And when was that, for the first time, Mr. Post?

A. Why, some time during the Fall. I cannot recall now just when it was.

Q. Well, let me see if I can help to refresh your recollection. Do you remember hearing that the Bronx Brass Foundry, a creditor in this proceeding, filed an objection to the claim of T. C. Palmenberg for some $260,000?

A. I do.

[fol. 55] Q. And wasn't it the day after that claim was filed and served upon the attorney for Mr. T. T. Palmenberg, that you communicated with the Trustee?

A. No.

Q. Well, when was it before that date that you had communicated to the Trustee the information which you have now given on examination?

A. I cannot give you the date. It was, oh, three or four months ago, I think.

Q. Now, will you search your memory, please, Mr. Post, and see if you cannot tell us the exact date?

A. No, I cannot. I mean, it does not——

Q. (Interposing:) You remember writing a letter to Otterbourg, Steindler & Houston, the attorneys for the Trustee here, don't you?

A. Yes.

Q. Now, when was that letter written, concerning the Bronx Brass Foundry, Incorporated's claim?

A. About a month ago.

Q. Have you got a copy of the letter before you?

A. No; but I have it here.

Mr. Goldstein: May I have that letter, Mr. Rosen?

Mr. Rosen: Absolutely not; and I will tell you why: That is a letter containing information given to us to sustain our case, and you will be getting all our facts to object to the claim, before our case is through.

Mr. Goldstein: I offer it for identification.

Mr. Rosen: I consent that it go into evidence, if your Honor please.

Mr. Goldstein: Very well. I offer it in evidence.

(Marked "Claimant's Exhibit C, February 16th, 1934.")

[fol. 56] Q. Now, Mr. Post, look at your letter of January 15th, 1934, please (handing Claimant's Exhibit C).

A. I am looking at it.

Q. All right. Does that letter help to refresh your recollection as to when for the first time you told the Trustee, or the Trustee's attorneys, that the Bronx Brass Foundry had allegedly obtained a preference?

A. Why, it was some time prior to that letter.

Q. The letter which has been marked in evidence as Claimant's Exhibit C, does not say anywhere in it, does it, that you ever informed the Trustee's attorneys about those facts before; does it?

A. No.

Q. Strange that it would leave out such a reference, isn't it?

Mr. Rosen: I object to that.

The Referee: Sustained.

Mr. Goldstein: Exception.

Q. Now, before you wrote this letter, you had received a letter from Mr. Rosen, had you not, from the Trustee's attorneys' firm?

A. Yes.

Q. Have you got that letter?

A. (Producing letter.)

Mr. Goldstein: I would like to have this marked in evidence.

Mr. Rosen: No objection.

(Marked "Claimant's Exhibit D, February 16th, 1934.")

Q. Do you recall the day of the meeting of creditors, Mr. Post, at which the question of the fees to be paid to Messrs. [fol. 57] Otterbourg, Steindler & Houston and you, among others, was to be taken up?

A. I do.

Q. Did you talk to Mr. Rosen on that day about the Bronx Brass Foundry?

A. I do not recall.

Q. Don't you remember that the Bronx Brass Foundry, through my office, filed objections to the claim made by you and by the attorneys for the Receiver?

A. They did.

Q. And doesn't that help to refresh your recollection as to whether or not you had any discussion with Mr. Rosen concerning the elimination of the Bronx Brass Foundry as a creditor in this proceeding?

A. No; not as you put it.

Q. Well, you had some talk with him then?

A. I don't recall any talk with Mr. Rosen that day.

Mr. Rosen: Mr. Referee, I object to the word "elimination." If Mr. Goldstein is familiar with the practice, we do not want to eliminate his claim.

(After discussion, off the record.)

Q. Did you talk to Mr. Rosen that day at all, Mr. Post?

A. I don't recall any particular conversation with him on that day.

Q. Do you recall when that was done, Mr. Post?

A. I do not. It was only recently that I heard of it.

Q. Did you hear of it before your letter of January 15th was sent to the attorneys for the Trustee?

A. I don't think so.

Q. Will you search your memory a little bit more, Mr. Post?

A. Perhaps if I could be told the date when that objection was filed, it might——

Q. (Interposing:) I tell you it was filed on or about the 9th day of January, was it not?

[fol. 58] The Referee: That is the objection to the claim?

Mr. Goldstein: Of T. C. Palmenberg.

Q. It was served on the 4th of January, and filed here on the 5th. Does that help to refresh your recollection, Mr. Post?

A. No, it does not; because I am not Mr. Palmenberg's attorney in this proceeding and nothing came to my knowledge concerning it.

By the Referee:

Q. What is the date of the Exhibit to you from the Trustee's attorneys asking for information?

A. September 28th, 1933.

By Mr. Goldstein:

Q. You did nothing about your letter of September 28th, 1933, until after the Bronx Brass Foundry had filed its objections to the claim of T. C. Palmenberg; isn't that so, Mr. Post?

A. No, it is not so.

Q. Well, now, you didn't write the letter of January 15th, until January 15th, did you?

A. No.

Q. And it was on January 4th, that Mr. Adelman was served with a copy of the objections to the claim of T. C. Palmenberg; is that not so?

A. If you say so. I don't know.

Q. And on the 5th of January that original objection to their claim was filed in the Referee's office here; isn't that so?

A. If you say so.

Q. You had not done anything between September [fol. 59] 28th, 1933, and January 15th, 1934, by way of writing a letter to Otterbourg, Steindler & Houston concerning the alleged payment of a preference to the Bronx Brass Foundry, had you?

A. I had not written a letter prior to that date.

Q. And what was it that stimulated you into activity on January 28th?

Mr. Rosen: I object to that question.

The Referee: Sustained. I think the examination can end on this phase.

Mr. Goldstein: I except to your Honor's ruling.

Redirect examination.

By Mr. Rosen:

Q. Mr. Post, you say that this Exhibit, Trustee's Exhibit 2 for Identification, was given to Mr. Goldstein?

A. I am sure that is the one.

Mr. Rosen: I offer it in evidence as Trustee's Exhibit 2 for Identification.

Mr. Goldstein: I have no objection to it, in view of Mr. Post's statement that he gave it to me; which, of course, I deny.

(Exhibit 2 for Identification received in evidence as "Trustee's Exhibit 2, February 16th, 1934.")

By Mr. Rosen:

Q. Mr. Post, when cross-examined by Mr. Goldstein you stated that the Trustee's Exhibit 2 in evidence, indicated that there was a capital of some $270,000, but it was by reason of the inclusion of $400,000 of good will; is that right?

Mr. Goldstein: I object to that. It speaks for itself.
[fol. 60] The Referee: Overruled. You went into it on cross-examination.
Mr. Goldstein: Exception. I object to it also because it calls for a conclusion on the part of the witness.

A. That is the reason I said that that is the result if you look at it merely from an arithmetical standpoint.
Q. And by the elimination of the good will, there would be a substantial deficit of over $200,000; is that correct?
A. Yes, sir.
Q. Was there any statement made at the meeting in March in your office with respect to the value of that good will of $400,000?
A. Yes; that it did not represent anything substantial. That it had been on the books ever since the incorporation of the corporation and that the patents and copyrights, whatever they were behind it, had long since ceased to have any value.

By the Referee:

Q. Well, had they expired?
A. I do not recall that the—I do not think I ever learned that there were any patents there. There were some copyrights that were no longer used. I do not think there was ever any patents.

Mr. Rosen: That is all.

By Mr. Goldstein:

Q. What you say you said about the good will was stated as your personal opinion, is that right?
A. Why, it was put something like this, as I recall it: "There is that item of good will that has been on the books [fol. 61] for a good many years. It does not represent any

real value because the trade-marks, or whatever it had, expired long ago."

Q. Did you understand that patents were carried on the books as good will?

A. I think the item is: "Good will, patents, trade marks."

Q. All together? Is that shown on that statement, Trustee's Exhibit 2?

Mr. Rosen: Yes.

Q. Let me see it, please. Did you know how much of the good will, patents and trade marks, was represented by patents?

A. You mean in 1933?

Q. How much of this $400,000?

A. In 1933?

Q. Yes.

A. Nothing. There was no value.

Q. In computing $400,000, did you know how much of it was represented by the item of patents?

A. I did not compute that figure.

Q. Then you did not know?

A. It was put on when the company was incorporated, on the first balance sheet, and had been carried at that value.

[fol. 62] In Re: J. R. Palmenberg's Son's, Inc.

Before: Hon. JOHN E. JOYCE, Referee

Adjourned Objection to Claim of Bronx Brass Foundry

New York, March 5, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

Maxwell H. Goldstein, Esq., Attorney for the Claimant.

Adjourned to Thursday, March 22, 1934, at 2 P. M.

HEARING ON OBJECTIONS TO CLAIM OF THEODORE C. PALMENBERG

New York, April 10, 1934, at 2:30 P. M.

APPEARANCES:

Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, Irving Trust Company by Aaron Rosen, Esq.

Samuel P. Adelman, Esq., Attorney for the Claimant.
Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.
Theodore C. Palmenberg, Claimant, in person.

[fol. 63] THEODORE C. PALMENBERG, called as a witness, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Palmenberg, are you an officer of the bankrupt company?
A. Yes.
Q. What office did you hold?
A. President and treasurer.
Q. You also held most of the caiptal stock of the company?
A. Yes, sir.
Q. You were in charge of the financial affairs?
A. Yes, sir.
Q. The bankrupt kept an accurate set of books?
A. Yes, sir.
Q. All entries in respect to all liabilities and credits were contained in the books?
A. Yes, sir.

Mr. Rosen: That is all.

There was a previous stipulation entered into between the Trustee and the Bronx Brass Foundry that the testimony of this claimant may be incorporated in the minutes on the hearing with respect to the claim of the Bronx Brass Foundry.

Q. Is it correct that on April 1, 1933, according to the books, the bankrupt was insolvent to the extent of $156,-254.63?
A. Yes, sir.
Q. The book assets of good will, patents and trade marks of $400,000 had no real value; is that correct?
A. It had some, but I don't know what the value was?
Q. It was very slight?
A. I considered it very much at one time.

Q. The patents and trade marks had no value at all?

A. No, sir.

[fol. 64] Q. The figure of the insolvency on April 1st of $156,254.63, according to the books, is substantially correct?

A. Yes, sir.

By Mr. Goldstein:

Q. What was the value of the name of the company at that time?

—. ——.

Q. How long had the name J. R. Palmenberg's been used by your company and predecessors in interest?

A. Eighty-one years.

Q. What is your opinion as to the value of the name of J. R. Palmenberg's in April, 1933?

A. I couldn't tell you; I couldn't answer that question.

Q. Was it worth $500 or $500,000?

Mr. Adelman: I object.

The Referee: Sustained.

Q. You mean it is so insignificant that you can't possibly guess at it?

Mr. Adelman: I object.

The Referee: Objection sustained.

Mr. Goldstein: I made a stipulation on the record here and also on the hearing of my case last Monday or Friday, in which I stated that the evidence taken here may be used at the hearing on my claim. If my cross examination is restricted, I will simply have to call Mr. Palmenberg again and go over the same subjects.

The Referee: Mr. Palmenberg says that he doesn't know and didn't know the value of the name in April, 1933. That is a definite and complete answer—he doesn't know.

Mr. Goldstein: It may be evasive.

[fol. 65] The Referee: All right. I will give you three questions to find out whether it is evasive or not.

Q. Do you consider that the name of J. R. Palmenberg's Sons or J. R. Palmenberg alone had any value at this time?

Mr. Adelman: I object.

The Referee: Objection sustained.

Mr. Goldstein: Exception.

Q. Do you know whether the name of J. R. Palmenberg's Sons or J. R. Palmenberg alone has any value in the model industry?

A. Yes, sir.

Q. Tell us what value, if any, it has.

Mr. Adelman: I object.

The Referee: Same ruling.

The Witness: I can't answer the question in dollars and cents.

Q. You mean it is so intangible that you can't possibly assess a figure?

A. Yes, sir.

Q. What, in your opinion, is the value of the name?

Mr. Adelman: I object.

The Referee: Overruled.

Mr. Adelman: Exception.

A. In dollars and cents, I can't tell you.

Q. You mean by that it is not worth anything?

Mr. Adelman: I object.

The Referee: Sustained.

Mr. Goldsteoin: Exception.

[fol. 66] Q. If you had to pay dollars and cents for it, what would your price be?

Mr. Adelman: I make the same objection.

The Referee: Same ruling.

Mr. Goldstein: Exception. I don't know of any other way to put that question.

The Referee: Proceed.

Q. During the eighty-one years that the firm was in business the name of J. R. Palmenberg was in use?

A. Yes, sir.

Q. Was that name circulated by salesmen and notes to customers in the model industry during the eighty-one years throughout the United States?

A. Yes, sir.

Q. Were the salesmen employed by J. R. Palmenberg during those eighty-one years soliciting people throughout the United States?

A. Yes, sir.

Q. Was it done on a large scale during that time?

Mr. Adelman: I object.

The Referee: He may state how large a scale it was done on.

A. By a number of men.

Q. What was the total sales a year for the ten years preceding 1933?

A. As high as $900,000, but that dropped to $300,000.

The Referee: When did it drop?

The Witness: 1929 to the end of 1932.

Q. Did the firm of J. R. Palmenberg's Sons receive orders from customers throughout the United States who were not solicited by salesmen during the ten years preceding the bankruptcy?

[fol. 67] Mr. Adelman: I object.

The Referee: Overruled.

Mr. Adelman: Exception.

A. Yes, sir.

Q. What proportion of the business done those years was done in that fashion?

A. I can't state that.

Q. Was it a fair proportion of it?

Mr. Adelman: I object to the form of the question.

The Referee: Sustained.

Q. Would you say 25 per cent of your business from customers was solicited by salesmen directly during the ten years preceding the bankruptcy?

A. I would be up against it for any figures, because it is hard to say how the orders were gotten.

Q. Did that company do an extensive advertising business in particular papers and other papers during the ten years preceding the bankruptcy?

A. Some.

Q. Some advertising?

A. Yes, sir.

Q. Once a month, or how many times a year?

A. Approximately on a monthly basis.

Q. Can you tell us in substance about how much on an average per year was spent for advertising?

A. I believe in 1929 it was about $10,000.

Q. After that how much per year was spent for advertising?

A. In the neighborhood of $5,000.

Mr. Rosen: I would like to have a concession that the liability at the time of the bankruptcy was, as per the books, $278,005.22.

The Referee: That includes the claim of $197,000?

[fol. 68] Mr. Rosen: Without interest.

Mr. Goldstein: I don't want to concede that. If any concession is made by the other side, I don't want it to appear that I joined in it.

Mr. Rosen: Will you concede that the accountant will testify to it?

The Referee: The question is whether it be conceded that the Trustee will testify that the liabilities of the corporation as shown on the books——

Mr. Rosen: $278,005.22.

The Referee: Which includes the claim of the witness in the sum of $197,916.21 plus interest, $24,517.47.

Mr. Goldstein: Without admitting the validity of the obligations as shown on the books, yes.

The Referee: All right.

Mr. Rosen: I would like a concession that they are on the books.

Mr. Goldstein: That this witness will so testify?

Mr. Rosen: Yes.

Mr. Goldstein: I will concede that, but I don't concede they were valid.

By Mr. Rosen:

Q. The liabilities appearing on the books of the bankrupt were all valid claims, as far as you know?

A. Yes, sir.

Q. All the entries contained in the books are accurate and correct?

A. With reference to the general claims?

Q. With reference to all liabilities.

[fol. 69] A. I know in my own case interest was never entered upon the books.

Q. Were any false entries made in the books at any time?

A. No, sir.

Q. Will you say that the liabilities in the books of the bankrupt at the time of the petition were $278,005.22?

A. Plus interest.

Q. Was the stock of the corporation or the bankrupt company reduced in any amount at the end of 1932?

Mr. Adelman: I object to the form of the question.

The Referee: He may ask whether there was any change in the stock structure of the corporation.

Q. Was there a meeting of the directors and stockholders at the end of 1932, at which a proposal was made for the reduction of the amount of the capital stock?

A. There was during that year, yes.

Q. Was the motion carried at the meeting?

A. I believe it was.

Q. It was?

A. Yes, sir.

Q. From what amount to what amount was the capital stock reduced?

A. Later it was to be reduced to $1 a share, common and preferred, and new stock at that time was to be issued. I don't know what the amount was, because they never carried it through.

Q. You say it was carried?

A. The suggestion was made, and the balance of the stockholders agreed to it.

Q. When you say it was not carried through, the legal [fol. 70] formality was accomplished?

A. Nothing was done at the meeting.

Q. It was voted at the meeting and nothing done?

A. Yes, sir.

Q. Was a proposal made at that time that you were to convert your loans to the corporation into shares of stock, take stock for your money?

Mr. Adelman: I object.

The Referee: Objection sustained. You may show that that was done, if that was the fact. Prove the consummation of it; omit "proposal."

Q. Was anything done about transferring stock from the corporation to you in payment of your loans?

A. No, sir.

Q. Did you agree to do so?

A. I did agree; I was willing to do that.

Q. Had you not agreed to do that with the other members of the corporation, stockholders and officers?

Mr. Adelman: I object.

The Referee: He will have to prove the transaction. That doesn't mean anything to me. Apart from the cross-examination, I don't know what he means by agreed, or whether he made a tentative arrangement.

Mr. Goldstein: I want to bring out that there was a proposal made and accepted.

Q. Was a meeting held at which such a proposal was made by you or made to you?

A. As I recall the thing, it was done at that time.

Mr. Rosen: At what time?

[fol. 71] The Witness: This meeting.

Mr. Rosen: What meeting?

The Witness: Of the stockholders, some time in 1932; if I recall, it was February or March, 1932.

The Referee: Are there minutes of that meeting in the books?

The Witness: Yes, sir.

Q. Tell us what happened at that meeting.

A. The proposal was made.

Mr. Rosen: I object, as the minutes of the meeting are the best evidence.

The Referee: Sustained.

Mr. Goldstein: Exception.

The Referee: He said there were minutes of that meeting.

Mr. Rosen: Here they are.

Mr. Goldstein: I don't understand the Trustee's position.

Mr. Rosen: You are going to knock out every objection to his claim.

Mr. Goldstein: I don't see that at all. This is a separate transaction.

Q. Maybe you can look at the minutes and show me where there is any entry of this transaction in the minutes.

Mr. Adelman: I object. There is no entry whatsoever. I object to the form of his question.

Q. Is there any meeting other than January 27, 1932, at which the proposal was made to convert into capital stock the loan made by you to the corporation?

A. There was no other meeting.

[fol. 72] Q. So that the record may be clear, I will ask you again what happened at the meeting of January 27, 1932, regarding the proposal to transfer your loans into capital stock?

Mr. Rosen: I object.

The Referee: Sustained.

Mr. Goldstein: Exception. I want to ask the witness whether these minutes are correct, and the question is directed for that purpose to the witness. It may be that all the minutes of the corporation are in the book.

Mr. Rosen: I offer these minutes in evidence.

(Received in evidence and marked Trustee's Exhibit 9, April 10, 1934.)

Q. Who kept that book, a part of which has been marked in evidence as Trustee's Exhibit 9 of this date?

A. Who had it?

Q. Who used to keep it?

A. Mr. Post.

Q. How long did he have that book prior to the bankruptcy?

A. I don't recall; probably a year.

Q. Whose duty was it to make entries in this book in the year 1932?

A. Mr. Post's.

Q. Was he present at the meeting on January 27, 1932?

A. Yes, sir.

Q. I ask you to read the minutes of the meeting of January 27, 1932, in the book marked Trustee's Exhibit 9 of this date, and tell us whether all the motions carried at that meeting are contained in this minute book?

A. As far as I can see, they are.

[fol. 73] Q. You told us just now that at that meeting a proposal had been made to you that the obligations of the corporation to you for loans made up to that time be converted into stock, and that you accepted that proposal at the meeting; is that right?

A. I accepted it?

Q. Yes.

A. No, sir.

Q. May I ask the stenographer to turn to the question and answer and read it back?

A. Maybe I misunderstood you.

Q. You want to make yourself clear now?

A. I would like to make it clear.

Q. All right; go ahead.

A. A proposal was made——

Q. By whom?

A. By me. According to my recollection, there was additional capital coming into the company from the other stockholders, and the offer was made at that time. There was no consummation of that deal. There was supposed to be a second meeting held some day in the future, when the matter was to be taken up, but nothing ever came of it.

Q. To whom had that proposition been made by you?

A. I believe it was made to Colonel Liggett, who was the spokesman for a group of stockholders, and another stockholder.

Q. At the meeting?

A. Yes, sir.

Q. Was anything done by Mr. Post or anybody else on behalf of the corporation to change the certificate of incorporation so as to provide for a different designation of the stock?

A. No, sir.

Q. The stock remained the same after January 27, 1932?

A. Yes, sir.

Q. At the time the special account of $2,500 represented by Trustee's Exhibit 3 was created, the bankrupt company [fol. 74] was buying merchandise and receiving credit from other creditors; is that right?

A. They were receiving some credit and they were paying a great deal of it.

Q. Some of the creditors who were crediting them on or about February, 1933, haven't received anything down to date.

A. Some have.

Q. Some have not.

A. Yes, sir.

Q. Some haven't received payment.

A. I don't know of any that didn't receive payment; I think the majority of them received some.

Mr. Goldstein: What percentage would you say they received?

The Referee: No, no; you will have to wait.

Q. Mr. Thursfield's company didn't receive payment on the claim?

A. I don't believe so.

Q. He sold merchandise—his company did, to Palmenberg's Sons on about February 28, 1933.

A. I think one final shipment came in.

Q. As a matter of fact, they sold merchandise to the bankrupt company after the meeting of the creditors at Mr. Post's office?

A. Yes, sir. I believe one shipment came in after that.

The Referee: We will adjourn to April 18th, at 2 P. M.

[fol. 75] Adjourned Hearing on Objection to Claim of Bronx Brass Foundry

New York, April 6th, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for Trustee, by Aaron Rosen, Esq.

Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry, Claimant.

(It is stipulated that this matter will be adjourned to April 18th, at 2 o'clock, at which time it will proceed. Counsel for the Claimant, Bronx Brass Foundry, stipulates that the testimony to be taken on the hearing of Objections by the Trustee to the claim of T. C. Palmenberg be made and deemed to be made a part of the record of the issues here.)

Adjourned to Wednesday, April 18th, 1934, at 2 P. M.

Adjourned Hearing on Objections to Claim of Bronx Brass Foundry

New York, April 18th, 1934, at 2 P. M.

Adjourned to Friday, April 27th, 1934, at 10:30 A. M.

[fol. 76] Adjourned Objection to Claim of Bronx Brass Foundry

New York, April 27, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Gustave I. Jahr, Esq.

Adjourned Objection to Claim of Theodore C. Palmenberg

(No appearance on behalf of Claimants)

The Referee: The objections to the claims of Theodore C. Palmenberg and the Bronx Brass Foundry are to be consolidated and will stand over until May 18, 1934, at 10:30 A. M.

ADJOURNED HEARING ON OBJECTIONS TO CLAIMS OF BRONX BRASS FOUNDRY AND THEODORE C. PALMENBERG

(Consolidated)

New York, May 18th, 1934, at 10:30 A. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

[fol. 77] Maxwell H. Goldstein, Esq., Attorney for Bronx Brass Foundry.

Samuel P. Adelman, Esq., Attorney for T. C. Palmenberg.

Walter L. Post, Esq., Attorney for Bankrupt.

(After discussion, off the record.)

COLLOQUY

Mr. Rosen: I will call Mr. Jacobs.

Mr. Goldstein: I would like to know in what status I stand here?

Mr. Rosen: Well, Mr. Jacobs' testimony will be used both in the Palmenberg claim and in the Bronx Brass Foundry claim.

Mr. Goldstein: I don't know what my friends want to do; but if I have to proceed here today, I want to go over all these books and records for the purpose of my claim, to check on the veracity of his report.

Mr. Rosen: All right; you can go ahead and do it.

Mr. Goldstein: In the first place, I would like to know what my status is here?

(After discussion, off the record.)

The Referee: One of the factors that enters into the Trustee's motion against the claim of Bronx Brass Foundry

is the claim of T. C. Palmenberg; and in view of that, and what has been indicated to be the stipulation, I will rule now that this testimony shall apply to both the Palmenberg and Bronx Brass claims; and counsel for the Bronx Brass may cross examine any witnesses called in respect of that matter.

[fol. 78] Mr. Goldstein: Now I do not think it is quite orderly, nor is it quite fair to the Bronx Brass Foundry as a claimant here, because we are going to have two parties cross examining a witness; we are going to have testimony of a witness given with respect to dates which have nothing to do with the claim of the Bronx Brass Foundry, the condition of the business at that time; and we are going to have dates which may have something to do—that is, the testimony as to condition on dates which may have something to do with the claim of Bronx Brass Foundry.

The Referee: If the claim of Palmenberg and its existence in the amount indicated by the proof of claim filed by him, is a factor necessary to determine whether the Trustee's motion against your claim is sound, then everything that is relevant and material on the existence of Palmenberg's claim is in turn relevant and material on your claim.

Mr. Goldstein: But I am not prepared to cross examine the witness with respect to the condition that existed at the times when the payments were made to Palmenberg; and it seems to me that that is something that is material and necessary so far as——

The Referee: Payments of what, that were made to Palmenberg?

Mr. Goldstein: Withdrawals made by Palmenberg, which is the basis of the objections.

The Referee: Why, there was testimony given at the last hearing with respect of checks given to Palmenberg.

Mr. Goldstein: That is right.

The Referee: And proof attempted by him, showing that [fol. 79] the repayments to him were in payment of a special loan which he made at a time he claims the bankrupt was insolvent, and set up as a separate and distinct account between him and the bankrupt; or that such payments were exchanges for moneys he advanced to the bankrupt.

I will give you an exception.

Mr. Goldstein: Well now, if that is going to be your ruling, I prefer to withdraw the claim of the Bronx Brass Foundry and step out; and I take my exception to your ruling; and I will file a formal one, if that is the ruling.

The Referee: File a formal what?

Mr. Goldstein: A formal notice withdrawing the claim.

Mr. Rosen: I object to the withdrawing of the claim.

Mr. Goldstein: I have a perfect right to do this.

(Submitting document to the Referee.)

The Referee: You have this all prepared?

Mr. Goldstein: Yes, sir.

The Referee: I see.

Mr. Rosen: He has not got the right to withdraw this claim—I will show your Honor a decision—once we file our objections and he has submitted to the jurisdiction of the Court as to whether or not a preference has been received, the decision of this Court is an adjudication on the question of a preference.

The Referee: Well, if the objection merely goes to its claim—whether he had a claim, why I am inclined to think he can withdraw it; but if the objection goes beyond that, and may admit of a ruling which would bind the Bronx [fol. 80] Brass Company outside of its status created by filing a claim, then you may not withdraw it; the Trustee is, in effect, seeking affirmative relief against this creditor; is that right? Is that your theory?

Mr. Rosen: That is right; to expunge the claim; and under the decisions, if the Trustee is successful in expunging the claim of the Bronx Brass, unless it pays back to the estate the alleged preference, that, as an operation of law, becomes an adjudication on this question; and upon the institution of a suit for the recovery of the preference, the decision in this proceeding would be binding upon that action, and we could get a summary judgment, or a judgment on the pleadings in the Federal Court, or any other Court. Now the Courts have repeatedly held in this Circuit—in this District, that once an objection has been filed to a claim, the objecting creditor is entitled to an adjudication and that claim cannot be withdrawn.

Mr. Goldstein: I thoroughly disagree with Mr. Rosen. I consulted the authorities too before I made it; and we have had a partial hearing so far; I have taken exceptions to

rulings. Now on behalf of my client I say again, we withdraw our claim; that is all. We make no claim now in this proceeding against the J. R. Palmenberg's Sons, Inc. In other words, it is in the nature of a discontinuance.

The Referee: Well, are not you very much in the position of a plaintiff who discontinues when there is a counterclaim pending against him?

Mr. Goldstein: I beg your pardon, sir?

Mr. Rosen: Exactly.

The Referee: I say, are not you very much in the posi-
[fol. 81] tion of a plaintiff who discontinues with a counterclaim against him?

Mr. Goldstein: No——

The Referee: He can discontinue his cause of action, but he cannot discontinue the counterclaim.

Mr. Goldstein: Mr. Referee, at this stage of the proceeding there is no counterclaim against us at all.

The Referee: I do not say that there is a counterclaim. I say that there is pending an objection.

Mr. Goldstein: Now your Honor may reserve decision on that. I have taken the step of withdrawing it. If your Honor does not want to have that noted on the record that you allow the withdrawal, I will stand on my rights.

The Referee: No; I won't make any determination now, in view of the objection that has been made by the Trustee to the withdrawal, which might be deemed by you to be a complete closing of this controversy. The Trustee has pointed out that he is seeking, or it is seeking against you a determination that there was a preference and that it would be entitled, if it is right, to a recovery against you for the amount of the preference.

Mr. Goldstein: His statement is very broad—is not as broad as it seems to be on the face of it. I don't want to enter into a lengthy argument—will you have this marked, please? My formal notice withdrawing our claim?

Mr. Referee: It may be filed.

(Mr. Goldstein files notice of withdrawal of claim of Bronx Brass Foundry.)

[fol. 82] (After further discussion, off the record.)

The Referee: It may be noted that counsel for the Bronx Brass Foundry has filed a written withdrawal of its claim.

Mr. Rosen: And I duly object to the withdrawal of the claim; and your Honor will allow me an exception to any ruling which permits the withdrawal of it.

The Referee: Well, do you wish to continue the objections to the claim of the Bronx Brass Foundry?

Mr. Rosen: I will simply take Mr. Jacobs' testimony. I want a ruling on this question.

The Referee: I know; but do you want to continue the evidence in support of your objections, despite the withdrawal of this claim?

The Rosen: Yes, sir; I want to continue it. It will just be Mr. Jacobs' testimony.

Mr. Goldstein: I am going to stand on my rights. This would be in the nature of a star-chamber proceeding.

The Referee: Do you care to remain?

Mr. Goldstein: No, sir; I cannot very well remain or participate in this proceeding without waiving my rights; and so, if your Honor pleases, I shall have to withdraw. If there is any doubt about it, I shall be pleased to submit authorities. This is my claim. Even if objection is filed, it is no more than a defense to the claim. I have a right to withdraw at any stage of the proceeding.

The Referee: Well, do you wish to proceed?

Mr. Rosen: Yes.

The Referee: I will hold that the Trustee may proceed with the objections to the claim of the Bronx Brass Foundry.

[fol. 83] Mr. Goldstein: And I have an exception?

The Referee: You have an exception.

Mr. Goldstein: Will the Stenographer please note that I have withdrawn from the proceedings, and I have actually left the room.

(Mr. Goldstein thereupon left the hearing.)

Mr. Adelman: Mr. Rosen, just to clarify the proceeding. You are proceeding on the Bronx Brass Foundry claim?

Mr. Rosen: Both. I have assumed the objections that were filed by Mr. Goldstein and I am proceeding with his objections to the Palmenberg claim.

Mr. Adelman: He has withdrawn; and you are availing yourself of his objections, as an amendment to your objections, rather, and wish to make it a part of your objections?

Mr. Rosen: That is right.

MATTHEW JACOBS, called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

Direct examination.

By Mr. Rosen:

Q. Mr. Jacobs, are you a certified public accountant?
A. Yes, sir.
Q. For how many years?
A. Oh, about fifteen years.
Q. You have examined the books of the bankrupt?
A. Yes.
Q. Now on April 1st, 1933, did the bankrupt have any cash in the bank?
A. No, sir.
[fol. 84] Q. Well, what was the condition of the bankrupt's bank account at that time?
A. It had an overdraft, so far as the books showed, an overdraft of $4,219.52.
Q. And on April 1st, 1933, what did the books indicate as to matured obligations for merchandise and money loaned?
A. Well, the books, accounts payable, of $43,223.67.
Q. And what portion of that was past due?
A. Oh, I should say about 90 per cent.
Q. And that is indicated from the books of the bankrupt?
A. Yes, sir.

Mr. Rosen: That is all.

By the Referee:

Q. That was on May 1st?
A. There were some more liabilities.
Q. (Question repeated.)
A. April 1st; that is as of April 1, 1933.

The Referee: Is that all?

By Mr. Rosen:

Q. Mr. Jacobs, what did the books indicate in respect to the assets?
A. There was petty cash as of that date of $69.46. Notes receivable $10,049.35; accounts receivable $10,361.75; inventory $33,726.91; equipment and fixtures, net after reserve

for depreciation $70,140.04; advances to salesmen $5,417.22; deferred charges (which was insurance) $1,852.54; good-will, patents, trade-marks, $400,000. Total assets, $527,-398.12.

Q. And what did the books indicate as to the liabilities on April 1, 1933?

[fol. 85] A. In addition to the—well, starting off again with accounts payable of $43,223.67; in addition to that there were notes payable of $22,134.29; notes payable to T. C. Palmenberg, $216,828.40; accrued dividends $1,467.39. Total liabilities of $283,652.75.

Q. It had a book net worth of how much?

A. As of that date?

Q. Yes.

A. Book value of—well, their capital was $243,745.37.

Q. Now you know that Mr. Palmenberg testified that the good-will, patents and trade-marks had no value at all?

A. Yes; I heard that——

Mr. Adelman: (Interposing) I object to that. That is not his testimony. He said he did not know.

The Witness: He said he did not know of any value.

Q. Well, you heard Mr. Post, an officer of the bankrupt, testify that they had no value?

A. I recall some testimony——

Mr. Post: (Interposing) No; I think I testified the same way.

By the Referee:

Q. Did the books show any valuation of those items?

A. No, sir; they were on since—as far as I could see, from the very inception of the business; that is, the corporation.

By Mr. Rosen:

Q. If you deduct the value of the good-will, patents and trade-marks as appearing upon the books, Mr. Jacobs, what [fol. 86] was the condition of the business?

A. Well, if you do that, the corporation would be insolvent to the extent of $156,254.63.

By the Referee:

Q. That is on April 1st, 1933?

A. April 1st, 1933.

Q. Did you make an audit as of any previous date?

A. As of the date of the bankruptcy, July 18th.

Q. Well, I mean, as of any date previous to April 1, 1933?

A. Oh, no; I did not make any audit. I just took these figures from the books and records.

Q. Did you make any examination of the figures as of any date previous to April 1, 1933?

A. No, sir. May I add that I have taken figures from the books previous to this date for the purpose of giving creditors full information as to the trend of the business. I took off a balance sheet for previous years and P & L figures.

By Mr. Rosen:

Q. What did the balance sheet of the previous date show, and what was the date?

A. Well, I have just got pencil figures here, which I showed the figures.

(After discussion, off the record.)

Q. Mr. Jacobs, the figures that you have testified to are contained on this sheet of paper? (Indicating.)

A. Yes, sir; that is a copy.

Mr. Rosen: I offer it in evidence.

[fol. 87] (Marked "Trustee's Exhibit 4".)

(After discussion, off the record.)

Q. Were there any shipments made in that period, Mr. Jacobs?

A. From the American Brass? Yes.

By Mr. Rosen:

Q. After February 28th, 1933?

A. Yes; quite a few.

Q. About how much?

A. Oh, about $1,300.

Q. And the American Brass have not received any payments on their account?

A. No, sir.

Q. Are there any other items of a similar nature?
A. Any other accounts?
Q. Yes?
A. Well, I will have to go through this whole book. (After examining book) There are some—quite a few of them—that is, you mean received no money at all?
Q. I mean, bills that were created after February 28th, 1933, when the special loan account was created, and upon which no payments were made at all?
(Witness continues examination of book.)

By Mr. Adelman:

Q. Did the American Brass ship you anything between March 18th and July 15th?
A. Yes; they shipped plenty.

By the Referee:

Q. How much did they ship?
A. Around $1,300 worth.
[fol. 88] Q. After February 28th, 1933?
A. Yes.
Q. Were they on a monthly basis?
A. I don't know. I would have to go to the purchase book and get the bills and everything else.
Q. Were there shipments in April by the American Brass?
A. Yes.
Q. How much did they amount to?
A. $418.
Q. And May?
A. May amounted to $149.
Q. And June?
A. None in June or July.

By Mr. Adelman:

Q. During those two months that you testified shipments were made, in April and May, were any payments made to the American Brass?
A. No; none whatsoever.

By Mr. Rosen:

Q. You say there are some other similar accounts?
A. Yes; a few of them.
Mr. Rosen: That is all.

[fol. 89] ADJOURNED HEARING ON OBJECTION TO CLAIM OF BRONX BRASS FOUNDRY

New York, June 21, 1934, at 2 P. M.

Present: Otterbourg, Steindler & Houston, Esqrs., Attorneys for the Trustee, by Aaron Rosen, Esq.

(No appearance on behalf of Claimant.)

RULING ON MOTION TO EXPUNGE CLAIM

Mr. Rosen: At this time I would like to take up the question of the claim of the Bronx Brass Foundry. I think we filed a memorandum in opposition to the withdrawal of their claim. They were notified of this hearing today.

The Referee: The Trustee moves to expunge the claim of Bronx Brass Foundry, Inc., upon the ground that within four months preceding the filing of the petition on July 18, 1933, it received voidable preferences.

In March, 1933 the claimant and the American Brass Company were the largest merchandise creditors. The bankrupt called a meeting, which was attended by representatives of each of them. The representatives of the American Brass Company testified that he stated at the meeting in the presence of the claimant's attorney, who is an accountant, and two of its representatives, that the debtor was bankrupt. The bankrupt's attorney, who was present, testified that the condition of the company, in- [fol. 90] cluding a very substantial indebtedness to its president, T. C. Palmenberg, was discussed and that he informed those present that the company was unable to carry on unless the creditors granted an extension of time, and added, that if Palmenberg pressed his claim, the company could not pull out of its difficulties. It was indicated at the meeting that he might be willing to subordinate his claim if the other creditors agreed to the extension proposed. The evidence sufficiently proves that the company was then insolvent to a very marked extent.

Within a few days the claimant instituted suit and shortly thereafter moved for summary judgment. To prevent judgment the bankrupt, after April 15th, gave and the claimant accepted six checks aggregating $1,000. Some of the checks were post dated. Two of them bore the endorsements of an officer, which the claimant required. The

American Brass Company was a creditor in a larger amount and sold and delivered merchandise to the bankrupt after the March meeting, but no payments were made to it.

Upon the proof adduced by the Trustee, it is plain that the claimant had reasonable cause to believe that the payments made to it effected preferences in its favor. After several hearings and the taking of testimony of some eighty pages, the claimant presented a written withdrawal of its claim. The Trustee refused to acquiesce in the withdrawal, and was permitted to proceed with its proof, whereupon counsel for the claimant withdrew.

The question presented is whether or not the claimant was entitled, on its own motion, to withdraw its claim and [fol. 91] thereby avoid a finding of preference which would be res adjudicata in a plenary suit to recover a preferential payment. When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants. In re Helfand Shoe Co. Inc., 22 A. B. R. (N. S.) 487.

The claim will be expunged unless within twenty days after entry of an order herein the claimant pays to the Trustee the sum of $1,000 with interest from the date of the service of the motion to expunge.

Closed.

[fol. 92] TRUSTEE'S EXHIBIT 1

No. 2789
May 26, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Samuel Shapiro
Maxwell H. Goldstein, Atty.
Maxwell H. Goldstein, Special

No. 2288
May 1, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Attorney for Bronx Brass Foundry—$250.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

T. C. Palmenberg
Maxwell H. Goldstein, Attorney for Bronx Brass Foundry. Special.

[fol. 93]

No. 2287
Apr. 24, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Attorney for Bronx Brass Foundry—$250.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

T. C. Palmenberg
Maxwell H. Goldstein, Atty., Special.

No. 2788
May 19, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Samuel Shapiro
Maxwell H. Goldstein, Atty.

[fol. 94]

No. 2791
June 9, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Maxwell H. Goldstein, Atty., Special.

No. 2792
June 16, 1933

J. R. Palmenberg's Sons, Inc.

Pay to the order of Maxwell H. Goldstein, Atty.—$100.00.
T. C. Palmenberg, President.

To Irving Trust Company.

(Back of Check)

Maxwell H. Goldstein, Atty.

[fol. 95] TRUSTEE'S EXHIBIT 2

Copy of report submitted by Isaac Schmelkin, Accountant & Auditor, 2932 Cruger Ave., New York.

Schedule "H"

J. R. Palmenberg's Sons, Inc. Page Seven

Balance Sheet—January 2, 1933

Assets:

Fixed Assets—Present Market Value:

Furniture & Fixtures	12,906.61	
Less Reserve for Deprec.	29.02	12,877.59
Tools and Auto—		
Active	8,913.90	
Less Reserve for Deprec.	322.24	8,591.66
Machinery	40,408.87	
Less Reserve for Deprec.	643.01	39,765.86
Patterns & Moulds—		
Active		6,510.00
Improvement Cost of Show-room		356.23
Total Fixed Assets		68,101.34
Good-will, Patents, & Trademarks		400,000.00

[fol. 96] Current Assets:

Petty Cash Fund—		
Third Street	90.37	
39th Street	10.00	
Boston	50.00	
Cash Irving Trust Co.	781.16	
Notes Due from Trade	52.50	
Accounts Receivable 22,914.79		
Less Res. for Bad debts 5,777.72	17,137.07	
Inventory—Market Value	33,726.91	
Total Current Assets		51,848.01
Advances to Salesmen		16,154.25
Deferred Charges:		4,431.68
Total assets		540,535.28

Copy of report submitted by Isaac Schmelkin, Accountant & Auditor, 2932 Cruger Ave., New York.

[fol. 97] Schedule "H"

J. R. Palmenberg's Sons, Inc. Page Eight

Balance Sheet—January 2, 1933

Current Liabilities:

Notes Payable		11,551.03
Accounts Payable		16,997.61
Loans Payable		10,046.25
Taxes Payable—New York State		1,467.39
Water & Real Estate Tax Reserve		358.20
Payroll & Salaries Payable		4,261.37
T. C. Palmenberg		217,991.67
F. Ordemann		7,800.00
D. Palmenberg		2,063.33
Total Current Liabilities		272,536.85
Salesmen Reserve for Commissions:		1,320.09
Reserve for Legal Fees		500.00
Contingent Liabilities:		
4th & Market, Adjustment Pending		1,625.00
Total Liabilities		275,981.94
Capital Stock:		
Capital Stock Common		400,000.00
Capital Stock Preferred	400,000.00	
Less Treasury Stock	34,500.00	365,600.00
Deficit Account		500,946.66
Total Liabilities, Capital & Surplus		540,535.28

[fol. 98] TRUSTEE'S EXHIBIT 3

J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Balance Sheet

March 1, 1933

Assets:

Fixed Assets—		
Furniture and Fixtures	12,906.61	
Less Reserve for Deprec.	29.02	12,877.59
Tools and Auto—Active	8,936.70	
Less Reserve for Deprec.	322.24	8,614.46
Machinery	40,577.22	
Less Reserve for Deprec.	643.01	39,934.21
Patterns and Moulds—Active		6,510.00
Improvement cost of show-room		2,196.08
Total Current Assets		70,132.34
Good-will, Patents, and Trade-marks		400,000.00
Current Assets—		
Petty Cash: Third Street	34.68	
Seventh Ave.	10.00	
Boston	50.00	
Notes Due from Trade	52.50	

[fol. 99] J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Accounts Receivable	22,474.26	
Less Reserve for Bad Debts	5,758.67	16,715.59
Inventory, Market Value, Jan. 1, 1933		33,726.91
Total Current Assets		50,589.68
Advances to Salesmen		16,296.74
Deferred Charges		2,715.98
Total Assets		539,734.74

J. R. Palmenberg's Son, Inc.

89 West Third Street, New York

Current Liabilities:

Notes Payable		10,240.39
Accounts Payable		19,956.12
Cash Overdrawn		760.11
Madison Industrial Corp.		7,218.19
Taxes Payable—New York State		1,467.39
Water and Real Estate Tax Reserve		608.20
Payroll and Salaries Due		7,553.69
T. C. Palmenberg and (Mary) differ		224,590.53
F. Ordemann		7,875.00
D. Palmenberg		2,083.33
Reserve for Sales Advertising		24.50
Total Current Liabilities		282,377.45
[fol. 100] Salesmen Reserve for Commissions		855.43
Reserve for Legal Fees		500.00
Contingent Liabilities—		
4th and Market Street—Adjust, Pending		1,625.00
Total Liabilities		285,357.88
Capital Stock—		
Capital Stock—Common		400,000.00
Capital Stock—Preferred	400,000.00	
Less Treasury Stock	34,500.00	365,500.00
		1,050,857.88
Deficit Account		511,123.14
		539,734.74

TRUSTEE'S EXHIBIT 4

J. R. Palmenberg Sons Inc.

Balance Sheet

April 1, 1933

Assets:

Cash in Bank Overdraft	$4,219.52	
Petty Cash	69.46	
Notes Receivable	10,049.35	
Accounts Receivable	10,361.75	
Inventory	33,726.91	
Equipment and Fixtures	70,140.41	
[fol. 101]. Advances to Salesmen	5,417.22	
Deferred Charges	1,852.54	
**Good Will, Patents & Trademarks	400,000.00	
Total Assets		$527,398.12

Liabilities and Capital:

Accounts Payable	$43,222.67	
Notes Payable	22,134.29	
Notes Payable—T. C. Palmenberg	216,828.40	
Accrued Taxes	1,467.39	
Total Liabilities		$283,652.75
Capital Stock Issued	$765,500.00	
Deficit	521,754.63	
Book Value of Capital		243,745.37
Total Liabilities and Capital		$527,398.12

**If you deduct the Good Will from the book value of the capital, you will find the corporation is insolvent to the extent of $156,254.63, even after allowing full value for all assets.

[fol. 102] CLAIMANT'S EXHIBIT B

Walter L. Post, Counsellor at Law, 84 William Street, New York

May 19, 1933.

Maxwell H. Goldstein, Esq.,
1440 Broadway, New York.

DEAR MR. GOLDSTEIN:

Re: Bronx Brass Foundry vs. J. R. Palmenberg's Sons Inc.

I confirm our conversation yesterday to the effect that no judgments have been entered against J. R. Palmenberg's Sons, Inc. I am having a search made to see if I can find any which may have been entered without my knowledge, but I doubt very much if any exists.

Very truly yours, Walter L. Post.

WLP:W

[fol. 103] CLAIMANT'S EXHIBIT C

Walter L. Post, Counsellor at Law,
84 William Street, New York.

January 15, 1934.

Otterbourg, Steindler & Houston, Esqs.,
200 Fifth Avenue, New York.

Attention of Mr. Rosen:

GENTLEMEN:

I have your letter with reference to the Bronx Brass Foundry, Inc.

The Bronx Brass Foundry was one of the first creditors of J. R. Palmenberg's Sons, Inc., who were called into conference after it was found that the company needed help. A meeting was held at my office, which was attended by Mr. Thursfield, representative of the American Brass Company, and representatives of the Bronx Brass Foundry with their attorney, Maxwell H. Goldstein. The financial condition of Palmenberg was explained to them and the figures on the latest balance sheet were shown them. These

showed that the company was insolvent. They were told, however, that if the creditors would work along with Mr. Palmenberg, he would be glad to enter into a satisfactory arrangement for the subordination of the debt to him. It is not my recollection that the formal agreement was presented at that meeting but the main terms thereof, that all merchandise obligations be extended for one year, [fol. 104] were explained to them. This meeting was sometime the latter part of February.

On March 15th a summons and complaint was served upon J. R. Palmenberg's Sons, Inc. I had several talks after that with Mr. Goldstein and whenever I talked with him I emphasized that the company was insolvent and if the creditors would not assist and grant extensions, the company would wind up in bankruptcy. Mr. Goldstein's attitude all through was that he was going to do all he could to get payment for his client, and it was the usual attitude assumed in these cases that the other creditors will see that the dissenter gets preference, rather than to have the entire settlement fail.

On April 15th a motion was made for summary judgment and one of the reasons for granting the motion was the allegation that creditors, including the Bronx Brass, had been asked for a long extension of time to pay. This motion was adjourned from time to time pending some payments which were made, and finally on May 19th the motion was withdrawn under an agreement that $500.00 would be paid at the rate of $100.00 a week. Mr. Goldstein insisted that these checks be endorsed by Mr. Shapiro, Vice-President of the Palmenberg Company, and I am not sure whether this was done. The stipulation provided, however, that judgment might be entered in the action should any judgment be entered against Palmenberg Company, a default be made in any of the payments, or a notice of bulk sale issued. All together there was paid, according to my recollection, $1,000.00 to the Bronx Brass, and I doubt if anyone of the checks went through the first time. I know that some of them were returned by the bank three or four times before being paid.

[fol. 105] The checks are in the possession of the Trustee and they probably will show what happened to them.

Yours very truly, Walter L. Post.

WLP:W

CLAIMANT'S EXHIBIT D

Law Offices of

Otterbourg, Steindler & Houston

200 Fifth Avenue, New York

December 28th, 1933.

DEAR SIRS:

Re—J. R. Palmenberg Sons, Inc.

In connection with the above entitled matter, I would greatly appreciate your forwarding me all of the details and data regarding the preference paid to the Bronx Brass Foundries, Inc. I contemplate instituting proceedings immediately.

Very truly yours, Otterbourg, Steindler & Houston,
by Aaron Rosen.

AR.JW
mb
to—Samuel P. Adelman, Esq.,
500—5th Avenue, N. Y. C., Walter L. Post, Esq.,
84 Williams Street, N. Y. C.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXPUNGING CLAIM

Upon the proof of claim filed herein by Bronx Brass Foundries, Inc., in the sum of $2,101.10, upon the petition of the Trustee to expunge the said claim dated January 5th, 1934, upon the notice of hearing dated January 18th, 1934, upon the answer of the said claimant to the proceedings filed February 2, 1934, and after hearing the testimony of the witnesses produced by the Trustee in support of its motion to expunge the claim of Bronx Brass Foundries, Inc., and it appearing to my satisfaction after hearing all of the testimony and after examination of all of the ex-

hibits submitted herein, that the bankrupt was insolvent at the time of the payment of $1,000 as more specifically referred to in the opinion of the Referee herein, and that the said claimant, Bronx Brass Foundries, Inc., had reasonable cause to believe that it was obtaining a preference, and it being my opinion that the payment of the said $1,000 to said Bronx Brass Foundries, Inc., was a preference in violation of the Bankruptcy Act, it is on motion of Otterbourg, Steindler & Houston, attorneys for the Trustee

[fol. 107] Ordered that the claim of Bronx Brass Foundries, Inc., filed herein in the sum of $2,101.10, be expunged, unless within twenty days from the date hereof, there be paid to the Trustee the sum of $1,000 together with interest from January 29th, 1934, and it is further

Ordered that the application of Bronx Brass Foundries, Inc., to withdraw its claim be and the same is hereby denied.

Dated, June 29, 1934.

John E. Joyce, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Hon. John E. Joyce, Referee in Bankruptcy:

The petition of Bronx Brass Foundry, Inc., respectfully shows:

1. That petitioner was a creditor in the above named proceeding, and, as such, was a party to the following pro-
[fol. 108] ceeding in said bankruptcy pending before Hon. John E. Joyce, as Referee in charge thereof, to wit:

Objection was made to the claim of the petitioner by the Trustee in Bankruptcy upon the ground that the petitioner had received a preference. In the said proceeding and prior to the time the Trustee had made out a prima facie case, the petitioner withdrew its proof of claim in this proceeding. It served upon the Referee in Bankruptcy a written notice withdrawing the proof of claim. Said notice

of withdrawal of the claim was accepted by the Hon. John E. Joyce, the Referee. That thereafter, and after the withdrawal, and acceptance of the withdrawal of the proof of claim, and on or about the 29th day of June, 1934 a final order was made by said Referee expunging the claim filed by the petitioner herein unless within twenty days from the date of said order there be paid to the Trustee the sum of $1,000.00, together with interest from January 29, 1934; and it was further ordered that the application of the Bronx Brass Foundry, Inc., to withdraw its claim be denied.

2. That the said order was and is erroneous in this:

(a) That the Referee had accepted the notice withdrawing the proof of claim from the petitioner herein and had no right thereafter to make an order expunging the said claim on the condition that the sum of $1,000.00 be paid as aforesaid.

(b) It was not proven that petitioner received any preference.

[fol. 109] (c) That the petitioner had the right to withdraw its proof of claim at any time before the hearings upon the objections were completed and a decision made.

(d) The denial of the application to withdraw the proof of claim was erroneous and contrary to law.

(e) The order denying the application to withdraw was entered without notice to the petitioner that hearings would be continued and conducted upon the said matter after the service of the notice of withdrawal of the claim had been accepted by the Referee. The order was violative of the rights of the petitioner and contrary to the constitutional provisions applicable thereto.

(f) It was not shown that there would be any prejudice to the Trustee in Bankruptcy by the withdrawal of the claim. There was an abuse of discretion, if any existed, on the part of the Referee in making the order complained of.

Wherefore petitioner prays that the said order be reviewed and that it be reversed, and that it be ordered that the petitioner had properly withdrawn its claim, and that

petitioner be restored to all things it has lost by reason of said errors.

Dated, New York, July 11, 1934.

Bronx Brass Foundry, Inc. by Morris Friedman, Secretary. Petitioner.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Bankruptcy—No. 57815

REFEREE'S CERTIFICATE

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

Pursuant to General Order XXVII, I, John E. Joyce, the referee in charge of the above matter, do hereby certify the following:

6. Objections of Bronx Brass Foundry, Inc., a creditor, to the claim of Theodore C. Palmenberg;

7. Petition of Bronx Brass Foundry, Inc., to review order expunging its claim unless it pay to the trustee the sum of $1,000 received as preferential payments, and denying its right to withdraw its claim during the hearing on the objections thereto;

8. Order dated June 29, 1934 to be reviewed;

9. Proof of debt of Bronx Brass Foundry, Inc., for $2,101.10;

10. Petition of the trustee to expunge that claim and notice of hearing thereon;

[fol. 111] 11. Answer to Bronx Brass Foundry, Inc.;

12. Notice of withdrawal by that creditor of its claim and proof of debt;

Attached are (a) minutes of hearing on the claim of Bronx Brass Foundry, Inc., containing at pp. 103-106, an opinion, and (b) minutes of hearing on the Palmenberg claim which contain at pp. 52-55 an opinion.

The petitions to review the two orders are included in one certificate because of the stipulation (Bronx Brass Foundry, Inc., Record, p. 77) that the testimony upon the Palmenberg claim be made and deemed part of the record on the other.

The facts and the question presented are stated in the respective opinions.

July 20, 1934.

Respectfully submitted, John E. Joyce, Referee.

To be placed on the Bankruptcy Motion Calendar of the United States District Court, July 25, 1934, and notice thereof given by mail to:

Otterbourg, Steindler & Houston, Attorneys for Trustee, 200 Fifth Avenue, New York, N. Y.

Samuel P. Adelman, Attorney for Theodore C. Palmenberg, 500 Fifth Avenue, New York, N. Y.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., 1440 Broadway, New York, N. Y.

[fol. 112] IN UNITED STATES DISTRICT COURT

In the Matter of J. R. Palmenberg's Sons, Inc., Bankrupt

Bankruptcy No. 57815

ORDER APPROVING ORDER OF REFEREE—Sept. 11, 1934

The Bronx Brass Foundry Inc., the claimant herein, having filed its petition to review a certain order made and entered on the 29th day of June, 1934 by the Honorable John E. Joyce, Referee, which order expunged the claim of the Bronx Brass Foundry Inc. unless the said claimant paid the sum of $1,000, together with interest, within twenty days thereof, and the hearing on said petition to review having duly come on before this Court on the 5th day of September, 1934,

Now, on reading and filing the petition to review of the [fol. 113] Bronx Brass Foundry Inc., verified the 11th day of July, 1934, and upon reading and filing the Referee's certificate of review on said petition, and after hearing Max-

well Goldstein, Esq., attorney for Bronx Brass Foundry Inc. in support of said petition to review, and Aaron Rosen, Esq., of counsel for Otterbourg, Steindler & Houston, attorneys for the Irving Trust Company, Trustee in bankruptcy herein, in opposition to said petition to review, and due deliberation having been had herein, and upon filing the decision of this Court, it is, on motion of Otterbourg, Steindler & Houston, attorneys for the Trustee in bankruptcy herein,

Ordered that the petition to review of the claimant, Bronx Brass Foundry Inc. be and the same is hereby dismissed, and that the action and order of the Referee in respect thereto be and the same hereby is approved.

Alfred C. Coxe, U. S. D. J.

[fol. 114] In United States District Court

Petition for Appeal

To the Honorable Judges of the United States District Court for the Southern District of New York:

The claimant, Bronx Brass Foundry, Inc. in the above entitled cause, conceiving itself aggrieved by the order, decree and judgment of the United States District Court for the Southern District of New York, made and entered herein on the 12th day of September, 1934, do hereby appeal from the said order, judgment and decree, and from every part thereof, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and pray that the said appeal may be allowed, that a transcript of the record and of the proceedings upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, September 20th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 115] To: Charles Weiser, Esq., Clerk of the above-named Court. Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

The foregoing appeal is hereby allowed.
Dated: October 5, 1934.

Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the claimant, Bronx Brass Foundry, Inc., and files the following assignment of errors upon which said claimant will rely upon the prosecution of the appeal in the above entitled cause from the order and decree and judg-
[fol. 116] ment made and entered in this Court on or about the 12th day of September, 1934:

1. That the Court erred in holding that the claimant, Bronx Brass Foundry, Inc. did not have the right to withdraw its proof of claim.

2. The Court erred in holding that the claim of Bronx Brass Foundry, Inc. be expunged unless it pay to the Trustee the sum of $1,000.00.

3. The Court erred in holding that claimant, Bronx Brass Foundry, Inc., received a preference.

4. The Court erred in holding that the Referee could proceed to take further evidence from the Trustee after the service of the notice of the withdrawal of the claim and the acceptance thereof by the Referee.

5. The Court erred in holding that the Referee could continue the hearing in the absence of claimant and its counsel on the objections to the claim of Bronx Brass Foundry, Inc. after filing of the notice withdrawing the claim, and without notice or warning to the claimant or its attorney that evidence would be taken against it and without giving the claimant due hearing and preserve its constitutional rights.

6. The Court erred in holding that the Referee could deny the application of the claimant to withdraw its claim; and that there was not an abuse of discretion on the part of the Referee therein.

[fol. 117] 7. The Court erred in approving the order of the Referee denying the application of the Bronx Brass Foundry, Inc. to withdraw its claim and expunging its

claim unless within 20 days the claimant pay to the Trustee $1,000.00. The Court erred in dismissing the petition for review filed by the claimant, Bronx Brass Foundry, Inc., to review the said order of said Referee.

Dated: New York, Oct. 4th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for Claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

To: Charles Weiser, Esq., Clerk of the above Court.
Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

[fol. 118] Citation in usual form omitted in printing.

[fol. 119] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable Judges of the District Court for the Southern District of New York:

The claimant, Bronx Brass Foundry, Inc., in the above entitled cause, conceiving itself aggrieved by the order, decree and judgment of the United States District Court for the Southern District of New York, made and entered herein on the 12th day of September, 1934, do hereby appeal from the said order, judgment and decree, and from every part thereof, to the Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith and pray that the said appeal may be allowed, that a transcript of the record and of the proceedings upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, September 20th, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 120] To the Clerk of the above named Court.
Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the claimant, Bronx Brass Foundry, Inc., and files the following assignment of errors upon which said claimant will rely upon the prosecution of the appeal in the above entitled cause from the decree and order made and entered in this Court on or about the 12th day of September, 1934:

1. That the Court erred in holding that the claimant, Bronx Brass Foundry, Inc. did not have the right to withdraw its proof of claim.

2. The Court erred in holding that the Referee could proceed to take further evidence from the Trustee after the service of the notice of the withdrawal of the claim and the acceptance thereof by the Referee.

[fol. 121] 3. The Court erred in holding that the Referee could continue the hearing in the absence of claimant and its counsel on the objections to the claim of Bronx Brass Foundry, Inc. after filing of the notice withdrawing the claim, and without notice or warning to the claimant or its attorney that evidence would be taken against it and without giving the claimant due hearing and preserve its constitutional rights.

4. The Court erred in holding that the Referee could deny the application of the claimant to withdraw its claim; and that there was not an abuse of discretion on the part of the Referee therein.

5. The Court erred in approving the order of the Referee denying the application of the Bronx Brass Foundry, Inc. to withdraw its claim. The Court erred in dismissing the petition for review filed by the claimant, Bronx Brass Foundry, Inc. to review the said order of said Referee.

Dated, New York, October 4, 1934.

Yours, etc., Maxwell H. Goldstein, Attorney for claimant, Bronx Brass Foundry, Inc., 1440 Broadway, Borough of Manhattan, City of New York.

[fol. 122] To the clerk of the above Court.

Otterbourg, Steindler & Houston, Esqs., Attorneys for Trustee, 200 Fifth Avenue, New York City.

[fol. 123] In United States Circuit Court of Appeals, Second Circuit

In the Matter of J. R. Palmenberg's Sons, Inc., Bankrupt.
Bronx Brass Foundry, Inc., Appellant

Order Granting Leave to Appeal—Oct. 15, 1934

A motion having been made herein for the appellant for leave to appeal from a certain order of the District Court, dated September 12, 1934.

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 124] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, January 10, 1935.

Otterbourg, Steindler & Houston, Attorneys for Trustee. Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc.

[fol. 125] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 126] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of

J. R. PALMENBERG SONS, INC., Bankrupt

BRONX BRASS FOUNDRY, INC., Claimant-Appellant,

against

IRVING TRUST COMPANY, as Trustee, Appellee

Before: L. Hand, Swan and Augustus N. Hand, Circuit Judges

Appeal from United States District Judge for the Southern District of New York

From an order of the District Court affirming a decision of the referee in bankruptcy which denied the application of the Bronx Brass Foundry, Inc., for leave to withdraw its claim against the bankrupt estate, and expunged the claim unless, within twenty days, there should be paid to the trustee the sum of $1,000 and interest, Bronx Brass Foundry, Inc. appeals. Affirmed.

Maxwell H. Goldstein, Attorney for Bronx Brass Foundry, Inc., Claimant-Appellant; Milton C. Jacobs, Counsel.
[fol. 127] Otterbourg, Steindler & Houston, Attorneys for Irving Trust Company as Trustee, Appellee; Aaron Rosen and Arnold A. Jaffee, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

Bronx Brass Foundry, Inc., a creditor of the bankrupt, filed its proof of claim for $2,101.10 and Irving Trust Company, the trustee, filed a petition to expunge the claim on the ground that the creditor, within four months prior to the date of filing the petition in bankruptcy, had received an unlawful preference of $1,000 knowing that the bankrupt was insolvent. The referee ordered the claim expunged unless the preferential payments should be restored to the trustee in bankruptcy within twenty days, and also denied an application by the creditor to withdraw its claim. That

order was affirmed by the District Court and the present appeal is taken from the order of affirmance.

When the motion to expunge the claim of the creditor was heard by the referee, the evidence clearly indicated that the creditor was paid $1,000 on account of its claim within four months of the date of the filing of the petition in bankruptcy and at a time when the latter knew that J. R. Palmenberg Sons, Inc., was insolvent, though it is not altogether certain that, if the assets existing at the time of such payment had been applied to the payment of all the creditors, the Bronx Brass Foundry, Inc., would have received more than its pro rata share. Before the hearing was closed, the creditor moved to withdraw the claim so as to avoid a decision by the referee that an unlawful preference had been received. The referee, John E. Joyce, Esq., in denying the motion to withdraw the claim rendered the following decision:

[fol. 128] "When a creditor files a claim against the bankrupt estate he elects a forum which may hear and determine whether a preference to him was made. Although judgment of recovery may not be granted, the finding thereon, subject to review, is conclusive as between the parties. It is not intended that a party shall have two trials of the same issue or be permitted to present the same issue to different tribunals for determination. When issue is joined upon the question whether a voidable preference has been received, the creditor may not withdraw of his own motion and thereby avoid such determination as the proof warrants. In re Helfand Shoe Co., Inc., 22 A. B. R. (N. S.) 487.

"The claim will be expunged unless within twenty days after entry of an order herein the claimant pays to the Trustee the sum of $1,000 with interest from the date of the service of the motion to expunge."

We are satisfied that the decision as well as the reasoning of the referee were entirely correct.

The questions raised by this appeal are: (1) whether the creditor had an absolute right to withdraw its claim, and (2) whether, if it had not, and the referee properly exercised his discretion in denying the application, the creditor received a voidable preference, though the proof did not show that when it was paid the $1,000 or ⅓d the amount then due it, the assets were insufficient to pay the other creditors ⅓d of the amount of their claims.

In support of the absolute right to withdraw the claim the decisions in Ex parte Skinner & Eddy Corp., 265 U. S. 86, 93; Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146; Scholl Mfg. Co. v. Rodgers, 51 Fed. [fol. 129] (2d) 971, (C. C. A. 8); Deeley v. Cincinnati, 23 Fed. (2d) 920, (C. C. A. 6), and Lawrence Ward's Island Realty Co. v. United States, 209 Fed. 201, 203, (C. C. A. 2) may be cited in support of the creditor's position. But the decisions of the Supreme Court go no farther than to say that a complainant may discontinue his suit unless its dismissal "would prejudice the defendant in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind." Ex parte Skinner & Eddy Corp. (at p. 93). Thus, if a defendant has interposed a counterclaim, the complainant has no absolute right to discontinue his suit. In Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 146, the court used general language and said: "If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion may deny the application." If leave to withdraw the claim had been granted, the trustee would have lost the right to litigate, in connection with its motion to expunge, the question whether the creditor had acquired a preference. Though the denial of leave did not entitle the trustee to a recovery, it did establish the fact of a preference; and left nothing for subsequent litigation except the amount of the claim. Everything else is res judicata. To have deprived the trustee of the right to establish in the summary proceeding the fact of a preference would have been to take away a substantial right.

In Scholl Mfg. Co. v. Rodgers, 51 Fed. (2d) 97, (C. C. A. 8), and in Deeley v. Cincinnati, 23 Fed. (2d) 920, (C. C. A. 6), it was said that such prejudice as we have mentioned was insufficient to bar the right of a creditor to withdraw his claim, but, with all respect, we do not think it necessary or desirable to allow the process of the court to [fol. 130] be trifled with by creditors whose rights have to be disposed of, if there is to be convenient and speedy administration of the estates of bankrupts.

Several District Courts of the Second Circuit have adopted local rules making the dismissal of suits in equity discretionary and we have approved such local rules. The

present rule of the Southern District of New York reads as follows:

"2. Voluntary Discontinuances. If justice require, the Court, after issue joined, may refuse to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action."

We think the foregoing rule valid and regard the right to discontinue as procedural rather than substantive and within the power of judicial regulation. While these rules do not in terms apply to bankruptcy courts, proceedings in those courts are in the nature of proceedings in equity, Bardes v. Hawarden Bank, 178 U. S. 524, 535, and the local rules we have mentioned indicate that the present judicial attitude toward the right to discontinue a suit or proceeding is more liberal than formerly.

It would have been particularly unreasonable to allow the creditor in the present proceeding to withdraw its claim. At the time when the application for leave to withdraw was made, the question whether the bankrupt was insolvent and whether the creditor had reasonable cause to believe that a preference would be effected by the payment, had already [fol. 131] been litigated before the referee at several hearings and the evidence was almost closed. It is impossible to discover any merit in the creditor's application and the granting of it would have involved at least some prejudice to the estate. In such circumstances denial was entirely justified. Smith v. Carlisle, 228 Fed. 666.

The claim that the payment of $1,000 within the four months period was not a voidable preference, unless it represented a larger percentage than the other creditors would have received, had the assets of the bankrupt been liquidated and distributed at the time when the payment was made, is thought to be substantiated by decisions of the Court of Appeals of the Eighth Circuit in Haas v. Sachs, 68 Fed. (2d) 623; Mansfield Lumber Co. v. Sternberg, 38 Fed. (2d) 614, 617, and W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 897. But we do not agree with the interpretation of Section 60 of the Bankruptcy Act on which those decisions were based. The retention by Bronx Brass Foundry Inc. of the $1,000 received from the insolvent would result

in giving it an advantage over the other creditors. The claim, before that payment was made, amounted to $3,000. If another creditor had a claim of $3,000 and the estate paid a dividend of 50%, Bronx Brass Foundry, Inc., would receive $2,000 in all, while the other creditor, though having a claim in the same amount, would receive but $1,500. The fallacy of the contention on the part of Bronx Brass Foundry, Inc. was pointed out by Judge Knappen in Commerce Guardian Trust & Savings Bank v. Devlin, 6 Fed. (2d) 518, 519, (C. C. A. 6).

Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the [fol. 132] situation would have been if the estate had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Bankruptcy Act § 60 (a).

Inasmuch as the retention by the creditor of $1,000 would work a preference in the present case, the referee properly required the return of that sum to the trustee as a condition of the allowance of the claim. Bankruptcy Act. § 57 (g).

Order affirmed.

[fol. 132½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of J. R. Palmenberg Sons, Inc., Bankrupt. Ex parte Bronx Brass Foundry Inc. Opinion. Augustus N. Hand, C. J.

[fol. 133] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of April, one thousand nine hundred and thirty-five.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of

J. R. PALMENBERG SONS, INC., Bankrupt,

BRONX BRASS FOUNDRY, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re J. R. Palmenberg, Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 22, 1935. William Parkin, Clerk.

[fol. 135] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 134, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of J. R. Palmenberg, Inc., Bankrupt, Bronx Brass Foundry, Inc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of April, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

Endorsed on cover: File No. 39,786. U. S. Circuit Court of Appeals, Second Circuit. Term No. 232. Bronx Brass Foundry, Inc., Petitioner, vs. Irving Trust Company, as Trustee in Bankruptcy of J. R. Palmenberg's Sons, Inc. Petition for a writ of certiorari and exhibit thereto. Filed July 9, 1935. Term No. 232 O. T. 1935.

(7061-C)